Supreme Court, U.S.
FILED

961616 APR 8 1997

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MARTHA LEIJA and JERRY LEIJA,
as next friends of ROSEMARIE LEIJA, a minor,
Petitioners,
v.
CANUTILLO INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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125 pp

QUESTION PRESENTED

What is the proper standard of liability under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*, for teacher to student sexual harassment?

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Burrow v. Postville Comm. Sch. Dist.,
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Doe v. Petaluma City School District
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Doe v. Taylor I.S.D., 15 F.3d 443 (5th Cir.
1994) (en banc) (Higginbotham, J.
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Ellerth v. Burlington Industries, Inc.,
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Franklin v. Gwinnett County Public Schools,
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Lipsett v. University of Puerto Rico,
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Mabry v. State Bd. of Community Colleges and
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Meritor Sav. Bank, FSB v. Vinson,
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Rosa H. v. San Elizario I.S.D.,
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Seamons v. Snow,
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Yusuf v. Vassar College,
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Statutes and Rules

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34 CFR 106.8(b), 106.9 12

62 Fed. Reg. 12,034 (1997) 11-12, 18

Miscellaneous

Joann Liebman Matson, Civil Rights--Sex Discrimination in Education--Compensatory Damages Available in a Title IX Sexual Harassment Claim, 15 U. Ark. Little Rock L.J. 271 (1993) 6

AAUW Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools (1993) 16, 17

Barbara A. Gutek & Mary T. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. Vocational Beh. 28 (1993) 15

Bernie R. Sandler, The Chilly Classroom Climate: A Guide to Improve the Education of Women, (Nat'l Ass'n for Women in Educ. 1996) . . 16

Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271 (1994) 17

DeNeed L. Brown, Schools Get Tough On Unwanted Touching: 'Boys Will Be Boys' Is no Defense as Girls Become Aware of Rights, Wash. Post, June 28, 1992, at A1 18

Elizabeth A. Williams et al., Impact of a University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50 (1992) . . . 17

Helene K. Dolan, The Fourth R-Respect: Combatting Peer Sexual Harassment in the Public Schools, 63 Fordham L. Rev. 215 (1992) 17

JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Law & Ineq. J. 163 (1992) 17

Jollee Faber, Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment, 2 UCLA Women's L.J. 85 (1992) 17

Judith I. Avner, Sexual Harassment: Building a Consensus for Change, Kan. J.L. & Pub. Pol'y 57 (Spr. 1994) 15

Nan Stein et al., Secrets in Public: Sexual Harassment in Our Schools (1993) 16

Peggy Crull, Stress Effects of Sexual Harassment on the Job: Implications for Counselling, 52 Am. Orthopsychiatry 539 (1982) 15

Restatement (Second) of Agency, §§ 219(1), 219(2)(b) & 219(2)(d) 7

Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Texas. L. Rev. 525 (1987) 16

Sally J. Kaplan, Consequences of Sexual Harassment in the Workplace, 6 Affilia 50 (1991) 15

Stefanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & Educ. 459 (1994) 17

Valerie Lee et al., The Culture of Sexual Harassment in Second Schools, 33 Am. Educ. Res. J. 383 (1996) 16

Petitioners Martha Leija and Jerry Leija, as next friends of Rosemarie Leija, a minor, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above proceeding on November 27, 1996.

OPINIONS BELOW

The opinion of the court of appeals is reported at 101 F.3d 393 (5th Cir. 1996) and is reprinted in Appendix A, *infra*. The memorandum opinion of the United States District Court for the Western District of Texas is reported at 887 F.Supp. 947 (W.D. Tex. 1995), and is reprinted in Appendix B, *infra*.

JURISDICTION

The court of appeals entered its judgment on November 27, 1996. App. C. Petitioners' motions for rehearing and rehearing en banc were denied on January 8, 1997. App. D. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments Of 1972, 20 U.S.C. §1681(a) provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance....

STATEMENT OF THE CASE

Eight year old Rosemarie Leija was repeatedly sexually molested in the classroom by her second grade health and physical education coach, Tony Perales. The brief discussions of the facts in the opinions below minimize the serious injury done to this little girl. App. A, B.

During this time period the Canutillo Independent School District had no policy banning sexual harassment of students or directing students or parents on how to make a complaint of sexual harassment or abuse. TR. 440-41. The Canutillo Elementary School Student Handbook merely informed parents and students who had "complaints" to first bring the matter up with their teacher. Ex. D-4, TR. 109.

Following this policy Rosemarie and her classmate, Lizeth Soto, approached their teacher, Pam Mendoza, and told her that Coach Perales was touching and "grabbing" their bottoms. TR. 358. Ms. Mendoza told the girls that she would speak to the principal about the matter; however, she did not. TR. 127, 329, 358. Rather, she reported the complaints to the perpetrator, Tony Perales. Ex. P1-79, TR. 127. The abuse continued.

Ultimately, although Rosemarie could not tell her mother all that Perales was doing to her, she did tell her mother that Coach Perales had touched her bottom. TR. 358-59, 627. Immediately, Mrs. Leija had a conference with teacher Pam Mendoza. TR. 630. Pursuant to the student handbook, Mrs. Leija reported to the teacher what Rosemarie had described, and added that other students were also receiving improper touches from Perales. Id. Teacher Mendoza told Mrs. Leija that she would look into the matter and take care of it. Id.

What Mendoza did, however, was to confront Rosemarie, threatening the child that if she was lying, she would be in trouble. TR. 361. After this threat, Rosemarie did not tell anyone else of Perales' harassment. TR. 361-62, 846.

Teacher Mendoza and Coach Perales had been given supervisory authority over the children in their classes. TR. 438, 478. They had been instructed by the school district to control the actions and behavior of the students in their charge. TR. 438. They had the power to discipline students if they failed to obey teacher commands. TR. 438-39. Perales even possessed the authority to direct that Rosemarie sit on his lap while he showed movies in a darkened classroom, at which times he would place his hands beneath her undergarments and rub her chest, her buttocks, and between her legs. TR. 439, 354-55, 738, 847-48.

None of the teachers in the Canutillo I.S.D. received training concerning the proper method of handling a report of sexual abuse or harassment. TR. 115-16, 164, 452, 477. Teacher Mendoza made no report of the complaints by Rosemarie, Lizeth Soto, or Mrs. Leija to any higher authority. There was no investigation of the complaints, and no policy or practice within the school district for the conduct of such an investigation. Indeed, had the school district received a report of sexual abuse, it required that the allegation be proven in a court of law. TR. 446

At the close of the evidence, the School District moved for judgment as a matter of law on the ground that plaintiff had not produced evidence of discriminatory intent on the part of the District. The trial court denied the motion. The jury found that teacher Mendoza did know or should have known of the sexual harassment of Rosemarie and that she failed to take reasonable steps to halt the

harassment. They returned a verdict awarding $1.4 million in compensatory damages.

Following the verdict, the trial court ignored the jury findings and determined that the School District was responsible for the sexual harassment of Rosemarie under a strict liability theory. The court also ordered a new trial on the question of damages, believing that it had incorrectly instructed the jury on the issue of compensatory damages. App. B. Subsequently, the court certified its order for appeal under 28 U.S.C. §1292(b). The opinion of the Fifth Circuit below was the result of the respondent's interlocutory appeal.

On appeal, the court of appeals determined that the doctrine of strict liability was not appropriate under Title IX. Instead, the Fifth Circuit, after reviewing and rejecting virtually every Title IX liability standard applied by courts across the country, stated it need not adopt any specific standard of liability under Title IX because whatever the standard, the court felt Leija's Title IX claim should fail. App. A.

REASONS FOR GRANTING THE WRIT

The decision in this case conflicts with several courts of appeals, a multitude of district court opinions across the country, and the Department of Education's interpretation of Title IX in several respects. Indeed, at the district court level, conflicting decisions are rapidly proliferating in virtually all circuits, making the need for guidance from this Court acute. This case is a timely opportunity for this Court to clarify the issue, since it is the first of the divergent Fifth Circuit pronouncements on what standard of liability should be imposed under Title IX; and this record will allow the Court to fully address all aspects of that question. The

decision below is erroneous, and the issue presented is neither narrow nor fact bound, but rather affects virtually every school-aged child in this country. The time has come for this Court to untangle the conflicting rulings regarding school officials' obligations under Title IX to respond to sexual harassment complaints.

I.

The ruling of the Fifth Circuit conflicts with the majority of decisions by other United States Courts of Appeals.

In 1979, this Court held that Title IX contained an implied private right of action under which an individual could bring a private lawsuit against a school for its violation. Cannon v. University of Chicago, 441 U.S. 677 (1979). Federal courts then began the arduous process of defining the contours of that action.

In O'Conner v. Peru State College, 781 F.2d 632, 642 n. 8 (8th Cir. 1986), the Eighth Circuit implied that the standards governing claims arising under Title VII of the Civil Rights Act of 1964, and Title IX were the same. In 1987, the Tenth Circuit found that since Title VII prohibits the identical conduct prohibited by Title IX, it would regard Title VII as "the most appropriate analogue when defining Title IX's substantive standards...." Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir.) cert. denied, 484 U.S. 849 (1987). In 1988, the First Circuit relied on EEOC guidelines and the legislative history of Title IX to conclude that the disparate treatment standard of Title VII should be extended to claims arising under Title IX. Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

Only the Eleventh Circuit disagreed with this approach and specifically refused to apply Title VII standards to Title IX; however, that decision was subsequently reversed. Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990), reversed on other grounds, 503 U.S. 60 (1992). In reversing the Eleventh Circuit, this Court ruled that a damages remedy was available to students who suffered sexual harassment in violation of Title IX, and issued a clear directive:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed. 2d 49 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75 (1992).[1]

Eventually, following Franklin's citation of Meritor and its dictum regarding application of "the same rule" to Title IX cases, virtually every Circuit began to apply some

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[1] Because this Court left for another day the issue of whether the substantive law of Title VII should be used in a Title IX claim brought by a student, at least one commentator surmised that Franklin would "lead to great confusion in the lower courts." Joann Liebman Matson, Civil Rights--Sex Discrimination in Education --Compensatory Damages Available in a Title IX Sexual Harassment Claim, 15 U. Ark. Little Rock L.J. 271 (1993). With the decision below by the Fifth Circuit, that prediction has become a firm reality.

permutation of Title VII standards to the review of Title IX claims. See, e.g., Roberts v. Colorado State Bd. of Agriculture, 998 F.2d 824, 832 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); Preston v. Commonwealth of Virginia, 31 F.3d 203 (4th Cir. 1994); Yusuf v. Vassar College, 35 F.3d 709, 714-15 (2d Cir. 1994); Brown v. Hot, Sexy and Safer Productions, 68 F.3d 525 (1st Cir. 1995); Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995); Davis v. Monroe County Bd. of Education, 74 F.3d 1186, 1191 (11th Cir. 1996), vacated, pending reh'g en banc; Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996); Kinman v. Omaha Public School District, 94 F.3d 463, 467-68 (8th Cir. 1996); Doe v. Claiborne County Board of Education, 103 F.3d 495, 514 (6th Cir. 1996) (agency principles applicable to sexual harassment claims arising in employment context under Title VII apply to sexual harassment claims brought under Title IX).

Arrayed against these opinions now stands a trilogy of Fifth Circuit cases, wherein that court has rejected any application of Title VII precepts to the Title IX claims, and in the process essentially abolished any possibility for liability under Title IX. In the instant case, Leija, the Fifth Circuit declined to articulate any standard of liability for Title IX claims; instead, it rejected the district court's application of strict liability,[2] and then went on to hold that under any liability standard it could think of Leija's claims should fail. App. A. Not only was this judgment erroneous on the record presented, it reached a result that would have come out differently in almost every other Circuit in this

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[2] The Seventh Circuit has explained that the term "strict liability" is not well suited to discrimination cases. Rather, it has suggested that the issue of liability without notice should be governed by the application of §219(1), §219(2)(b) & (2)(d) of the Restatement (Second) of Agency. Ellerth v. Burlington Industries, Inc., 102 F.3d. 848 (7th Cir. 1996).

country. Ignoring the record evidence and Title IX jurisprudence employed by its sister courts of appeals (as detailed in Judge Dennis' dissent), App. A, the majority opinion reversed the district court's decision and remanded this case for entry of judgment in favor of the school district.

The Fifth Circuit's obdurate Title IX standard next evolved in the opinion of Rosa H. v. San Elizario I.S.D., 106 F.3d, 648 (5th Cir. 1997), where it held that constructive notice of sexual harassment of a student was insufficient for imposing liability on a school district. Then, in Doe v. LagoVista I.S.D., 1997 U.S. App. LEXIS 3273 (5th Cir. 1997), the court dealt the *coup de grace* to the idea that Title VII standards should apply to Title IX claims by flatly rejecting the application of common law agency principles to impose liability on a school district.[3]

The principal impact of the Fifth Circuit's divergent stance, as hightlighted by the extensive analysis in this case, comes in the application of common law theories of intent under Title VII. This Court, in Franklin, indicated that "intentional" discrimination was a prerequisite to holding an educational institution monetarily liable under Title IX. Franklin, 503 U.S. at 75 n. 8. As the Court held:

> [t]the point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.

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[3]The time period for seeking *certiorari* review has not yet passed for either Rosa H. or Doe. Counsel herein is also counsel for plaintiffs in Rosa H. and believes a petition for *certiorari* will be forthcoming in that case should the Fifth Circuit refuse rehearing and rehearing *en banc*.

Franklin, 503 U.S. at 74-75 (citation omitted). The facts in Franklin, teacher to student sexual harassment, are the same as here, and have previously justified the imposition of *respondent superior* or vicarious liability so that the intentional acts of an agent of the educational institution, such as a teacher, are imputed to the institution itself. Burrow v. Postville Comm. School Dist., 929 F.Supp. 1193, 1203 n. 8 (N.D. Iowa 1996); Doe v. Petaluma City Sch. Dist. 830 F.Supp. 1560, 1575 (N.D. Cal 1993).

The Fifth Circuit's Title IX jurisprudence thus conflits with those of other circuits which recognize a school district's liability if it knew or should have known of the harassment and failed to take appropriate remedial action or if a supervisor (teacher) used the power delegated specifically to him by his employer to discriminate on the basis of sex. Kinman, 94 F.3d at 467-68; Hasting v. Hancock, 842 F.Supp. 1315, 1313 (D. Kan. 1993). By failing to apply the same Title VII common law agency standards as applied by the other courts of appeals, the Fifth Circuit has rejected the idea of *respondeat superior* or vicarious liability under Title IX.[4] If notice might even be required to a school board member, Leija, 101 F.3d. at 401, then a school district would never be vicariously liable for the intent of the perpetrator, but only for its own direct intent.

This Court should grant the Petition to resolve the conflict among circuit and district courts, exemplified by the decision below, concerning the proper liability standard for sexual harassment of students by teachers under Title IX. Specifically, the decision below (1) misinterprets established

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[4] In its opinion in Doe v. Lago Vista I.S.D., 1997 U.S. App. Lexis 3273 (5th Cir. 1997), the Fifth Circuit has now held that a school district could only be found liable for damages to a student that occurred after the school had received actual notice of sexual harassment or abuse.

sexual harassment doctrine concerning what constitutes sufficient notice to require institutional action; and (2) ignores a critical theory of liability under which institutions are liable for sexual harassment by employees when the employee acts with actual or apparent authority of the institution.

II.

The Fifth Circuit's Title IX analysis is wrong, and this case is the right vehicle to clarify this area.

Certiorari should be granted in this case because the record it presents will allow this Court to resolve the widening split among the courts below. It is no accident that most other circuits have applied Title VII standards to resolve Title IX claims; this Court intimated in Franklin that Title VII standards should apply to Title IX. Franklin, 503 U.S. at 75; see also Doe 103 F.3d at 514; Kinman, 94 F.3d at 467-68; Murray, 57 F.3d at 248-49. This application of Title VII standards to adjudicate Title IX cases has proven to be a workable interpretation. Bruneau v. South Kortright Central School District, 935 F.Supp. 162 (N.D. N.Y. 1996); Burrow v. Postville Comm. Sch. Dist., 929 F.Supp. 1193 (D. Iowa 1996); Pallet v. Palma, 914 F.Supp. 1018 (S.D. N.Y. 1996); Pinkney v. Robinson, 913 F.Supp. 25 (D.D.C. 1996); Ward v. Johns Hopkins University, 861 F.Supp. 367 (D. Md. 1994); Saville v. Houston County Healthcare Authority, 852 F.Supp. 1512 (M.D. Ala. 1994); Hastings v. Hancock, 842 F.Supp. 1315 (D. Kan. 1993); Doe v. Petaluma City School District 830 F.Supp. 1560 (N.D.Cal. 1993) reconsideration granted, 949 F.Supp. 1415 (N.D.Cal. 1996); Patricia H. v. Berkeley Unified Sch. Dist., 830 F.Supp. 1288 (N.D. Cal. 1993). That Title VII case authority is the most appropriate analogue when defining Title IX's substantive standards is Title was recently recognized by the Sixth Circuit:

> Both Title IX's legislative history and the regulations enacted pursuant to it amply support this approach. The House Report on Title IX states that 'Title VII..specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.

Doe v. Claiborne County Board of Education, 103 F.3d 495, 514 (6th Cir. 1996); see also Roberts, 998 F.2d at 832.

In the opinion below, however, the Fifth Circuit shut its eyes to the Title IX reality of the rest of the country. On March 13, 1997, the Department of Education's Office for Civil Rights ("OCR"), the federal agency that enforces Title IX, has now issued a policy guidance for schools entitled, "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties." 62 Fed. Reg. 12,034 (1997) [hereinafter OCR Guidance]. The OCR Guidance states that it has been OCR's long-standing policy and practice to apply Title VII sexual harassment standards to Title IX cases. Id. at 12,038 n.2; cf. Dep't. of Educ., Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,448 n. 1 (Mar. 10, 1994) (applying Title VII standards to racial harassment under Title VI of the Civil Rights Acts of 1964). The Office for Civil Rights thus told school districts that:

> [I]n the absence of effective policies and grievance procedures, if the alleged harassment was sufficiently severe, persistent, or pervasive to create a hostile environment, a school will be in violation of Title IX because of the existence of a hostile

environment, even if the school was not aware of the harassment and thus failed to remedy it.

OCR Guidance, 62 Fed. Reg. 12,040 (March 13, 1997). OCR has also told schools that they will be considered to have received notice of sexual harassment of students by employees if parents or students have contacted "appropriate personnel"-- including a teacher. 62 Fed. Reg. 12,042 (March 13, 1997). Indeed, it has been the rule of OCR since it first promulgated Title IX regulations in 1975 that schools are required to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination. 34 CFR 106.8(b) and 106.9. As this Court noted in Meritor, federal agency guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor, 477 U.S. at 65.

As the OCR Guidance makes clear, and as the majority of courts of appeal have recognized, the issue of notice is central to whether there will be an effective application of Title IX. According to Title VII standards, an employer will be held liable if it "either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it." Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995). The Eighth Circuit has recently held that an employer's complaint procedure that is not "calculated to encourage victims of harassment to come forward did not insulate the company from Title VII liability for sexual harassment." Varner v. National Supermarkets, Inc., 94 F.3d 1209 (8th Cir. 1996). Likewise in Splunge v. Shoney's Inc., 97 F.3d 488 (11th Cir. 1996), the Eleventh Circuit held that Shoney's could not complain about a lack of

notice because a reasonable jury could find that the company's sexual harassment policy was never communicated to plaintiff.

Based on the uncontroverted evidence at trial, the district court instructed the jury that, *as a matter of law*, the reporting of Coach Perales' abuse of Rosemarie Leija to teacher Pam Mendoza was sufficient notice to the school for Title IX liability to attach:

> Pam Mendoza, the second grade teacher of Rosemarie Leija, was an agent of Defendant Canutillo I.S.D. because, as a part of her duties in the scope of her employment, she was an appropriate person to receive complaints of sexual harassment or abuse from students like Rosemarie Leija.

App. F. Yet the majority opinion chose to ignore this and the other bases upon which Rosemarie Leija's claims would have been upheld in virtually every other Circuit in this country.

The decision below also conflicts with established authority holding parties liable for harassment committed with actual or apparent authority. As Judge Dennis' dissent explains, the school should be liable because: (1) Leija's complaints of sexual molestation made to Rosemarie's home room teacher constituted sufficient notice *because the school district failed to provide any grievance procedure as required by Title IX*, and (2) Coach Perales' conduct constituted *quid pro quo* harassment, for which the school district should be liable for *regardless* of whether it knew or should have known or approved of the harassment. It is undisputed that the school district here had no complaint and grievance procedure in place as required by Title IX; and it is also clear that during the period of time Coach Perales was

molesting Rosemarie, his eight-year-old student, he had singled her out for special attention and exceptional favors such as letting her run errands for him and giving her candy and other gifts which he did not confer on the other students. App. A. Such evidence would certainly have been sufficient to uphold the jury verdict below even absent the District Court's imposition of strict liability had Rosemarie's case been heard by any court outside the Fifth Circuit. Cf. Splunge v. Shoney's, Inc., 97 F.3d 488 (11th Cir. 1996); Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995); Varner v. National Supermarkets, Inc., 94 F.3d 1209 (8th Cir. 1996); Pinkney v. Robinson, 913 F.Supp 25 (D.D.C. 1996).

But the Fifth Circuit has eliminated these Title VII concepts as potential bases for Title IX accountability, and instead formulated a requirement that only notice given to someone with the authority to take remedial action will suffice to meet its liability standard--even if this means that a little girl in the second grade such as Rosemarie has to voice her complaint of sexual molestation at a school board meeting! Cf. App. A. While the policy ramifications of setting the barrier to Title IX liability so high are examined in the next section, the point here is that it is *this* case and *this* record which afford this Court the opportunity to address the entire spectrum of issues surrounding the standard of liability that should be utilized in Title IX cases.

III.

The question presented is important.

Courts and scholars have long recognized the damaging and discriminatory effects of sexual harassment. In its most recent sexual harassment ruling, this Court acknowledged that sexual harassment can create environments "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability" of the affected individual. Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 371 (1993); see also Barbara A. Gutek & Mary T. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. Vocational Beh. 28, 31-35 (1993); Judith I. Avner, Sexual Harassment: Building a Consensus for Change, Kan. J.L. & Pub. Pol'y 57, 68-70, 73-74 (Spr. 1994); Sally J. Kaplan, Consequences of Sexual Harassment in the Workplace, 6 Affilia 50, 53 (1991); Peggy Crull, Stress Effects of Sexual Harassment on the Job: Implications for Counselling, 52 Am. Orthopsychiatry 539, 541 (1982).

This Court should clarify a school's obligation to take action when a student reports sexual harassment by a teacher. The policy imperatives driving courts to outlaw sexual harassment at work apply with even more force in schools. Title IX would not fulfill its mandate to prohibit discrimination on the basis of sex if it did not offer at least the same civil rights guarantees to students who are sexually harassed as those adults receive at work. As one court recognized, "A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." Patricia H.

v. Berkeley Unified Sch. Dist., 830 F.Supp. 1288, 1293 (N.D. Cal. 1993) (citing Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Texas L. Rev. 525, 551 (1987). If any differences apply, schools should be held more responsible for the educational environment than employers are for the workplace: "The distinctions between the school environment and the workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools." Patricia H., 830 F.Supp. at 1292-93.

While the importance of preventing the sexual abuse and molestation of young school children should be obvious; three recent surveys exploring the frequency and severity of sexual harassment in schools and its effect on students confirm its devastating impact. See Valerie Lee et al., The Culture of Sexual Harassment in Second Schools, 33 Am. Educ. Res. J. 383 (1996); Nan Stein et al., Secrets in Public: Sexual Harassment in Our Schools (1993); AAUW Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools (1993). These studies reveal that sexual harassment in schools imposes serious educational, emotional, and physical consequences that operate as a barrier to full and equal participation in education. For example, studies show that: 33% of girls who suffered sexual harassment say they do not want to attend school; 32% report not wanting to talk as much in class; 28% find it harder to pay attention in school; and 18% report thinking about changing schools. - See Hostile Hallways at 15-16. Sexually offensive hostile environments may reduce female students' class participation, and may even cause girls to drop out of classes entirely. Bernie R. Sandler, The Chilly Classroom Climate: A Guide to Improve the Education of Women, 15-17, 19 (Nat'l Ass'n for Women in Educ. 1996). In addition, 64% of the girls who have been harassed report suffering from

embarrassment; 52% of them report feeling self-conscious; 43% of them feel less sure or less confident about themselves; and 30% of them doubt whether they can have a happy romantic relationship. See Hostile Hallways at 16-17. A school's failure to respond adequately to the problem can exacerbate the emotional, physical and educational harm suffered by students who are sexually harassed. See Stefanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & Educ. 459, 466-69 (1994); see also JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Law & Ineq. J. 163, 177 (1992).

Nor is it poor policy to subject schools to liability under Title IX. Studies show that schools' actions, including adopting and implementing a clear sexual harassment policy and grievance procedure, can reduce the incidence of sexual harassment. See Elizabeth A. Williams, et al., Impact of a University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50, 57, 59, 62-63 (1992). Holding schools liable for the consequences of sexual harassment, and for their failure to adopt and publish a Title IX policy, provides a compelling incentive for schools to take critical steps to combat harassment and protect America's children. See Strauss, supra at 178, Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271, 307 (1994); Jollee Faber, Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment, 2 UCLA Women's L.J. 85, 91 (1992). Appropriate training for teachers and other school personnel enables them to address peer sexual harassment, to respond effectively when they witness incidents, and leads to heightened awareness by both students and teachers. See Helene K. Dolan, The Fourth R-Respect: Combatting Peer Sexual Harassment in the Public

Schools, 63 Fordham L. Rev. 215, 243 (1992) (citing DeNeed L. Brown, Schools Get Tough On Unwanted Touching: 'Boys Will Be Boys' Is No Defense as Girls Become Aware of Rights, Wash. Post June 28, 1992, at A1).

Because schools are fertile grounds for sexual misbehavior by persons in positions of authority, the Department of Education's Office for Civil Rights requires schools to adopt and publish grievance procedures, and to develop a mechanism for discovering, and therefore remedying, sexual harassment as early as possible. OCR Guidance, 62 Fed. Reg. at 12,038, 12,044-45. OCR requires schools to make sure students and their parents know how to report problems, and to make follow-up inquiries concerning any retaliation. Id. at 12,044-45. It also recommends that schools adopt procedures to help ensure that students and their parents understand that the school will not tolerate sexual harassment, and which will encourage students to bring problems to the school's attention. Id. In addition, it recommends training administrators, teachers and staff about sexual harassment, and making training information available to students well. Id.

Thus despite the assertion in the opinion below that no sound policy reason exists to hold a school district financially liable for the criminal acts of its teachers, other courts, scholars, and the Executive Branch have determined that educational institutions--especially elementary and secondary schools--are critical battlegrounds in the fight against sexual discrimination, harassment, and molestation. Nowhere are the victims more vulnerable and trusting, and the perpetrators more able to inflict long-term damage, than in an elementary school setting like the one in this case; where young children are taught to honor, respect and *obey* their instructors. Doe v. Taylor I.S.D., 15 F.3d 443, 463,

466-67 (5th Cir. 1994) (en banc) (Higginbotham, J. concurring), cert denied, __U.S.__, 115 S.Ct. 70, 130 L.Ed. 2d 25 (1994).

CONCLUSION

A horrible tragedy was visited upon Rosemarie Leija; one which the Canutillo Independent School District took no steps to prevent, and which its agent, Pam Mendoza, chose to first ignore and then to exacerbate. Only this Court can ensure that other children in the Fifth Circuit--and across this country--do not face the same fate by setting the proper standard of liability under Title IX for sexual harassment of a student by their teacher. Only this Court can make the singular decision necessary to guide courts and school administrators nationwide in applying the implied right of action earlier recognized under this federal statute.

And this is the case in which to make that pronouncement. The opinion below conflicts with virtually every other court to have addressed the issue, as well as the government's interpretation of Title IX; and the course charted by subsequent Fifth Circuit opinions shows that this one is no aberration. The decision herein followed a full jury trial, and the record in this case will allow this Court to fully address all aspects of the question presented. The question of what standard of liability should be applied under Title IX for teacher to student claims of sexual harassment has percolated through the lower courts enough. *Certiorari* review should be granted, and this Court should resolve the various conflicts of how courts across this country are (or are not) imposing liability under Title IX for sexual harassment and molestation of a student by a teacher.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF APPEALS
FILED
NOV 27 1996
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50791

CANUTILLO INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellant,
versus
MARTHA LEIJA and JERRY LEIJA
as next friends of ROSEMARIE LEIJA,
a minor,
Plaintiffs-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(EP-93-CA-478-F)

Before GARWOOD, BARKSDALE, and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

This interlocutory appeal by the Canutillo Independent School District turns on whether, under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, a school district is strictly liable for its teacher's sexual abuse of a student; and, if not, whether another teacher's being told

about the abuse is sufficient notice to the school district for possible liability under some other standard. We REVERSE the denial of the school district's motion for judgment as a matter of law on the Title IX claim and REMAND.

I.

The school district is located in Canutillo, Texas and receives federal financial assistance. At the Canutillo Elementary School, Rosemarie Leija was assigned in 1989 to the second-grade homeroom class of Pam Mendoza and the physical education/health class of Tony Perales.

Perales' classes were a part of the daily curriculum. Once a week, he taught health, which consisted primarily of showing movies to his students in a darkened classroom. Throughout the 1989-90 school year, Perales sexually molested Leija during these showings. One of Leija's classmates testified that, during this same time period, she was also molested in a similar manner by Perales.

In early 1990, Leija and the other student told Mendoza about some of Perales' actions. Mendoza spoke with each of the girls individually and told them to avoid Perales. Mendoza talked to Perales about the accusations, but she did not advise anyone else, such as the superintendent or principal. Later that spring, Leija told her mother that Perales had been touching her. Leija's mother discussed the matter with Mendoza at one of the regularly scheduled parent-teacher conferences, and Mendoza told her that she would look into the matter. Leija's mother did not discuss this with anyone other than her husband. According to Leija, Mendoza confronted her after the conference and threatened her with "trouble" if she was lying about her accusation.

Afterwards, Leija did not speak with anyone about the abuse until she began counseling sessions in 1993. Her parents, as next friends, then filed this action against the school district (CISD) and Perales under Title IX and under 18 U.S.C. § 1983. Summary judgment was granted CISD on the § 1983 claim.

During the trial of the Title IX claim, at the close both of Leija's case and of all the evidence, CISD moved for judgment as a matter of law on the basis that, *inter alia*, Lieja had not produced evidence of discriminatory intent on its part. Both motions were denied, and the special interrogatories given the jury premised CISD's liability instead on a "negligent agent" theory:

> Did Pam Mendoza, as an agent of [CISD], know or, in the exercise of reasonable care, should she have known, of the sexual harassment or abuse by Tony Perales against Rosemarie Leija?
>
> Did Pam Mendoza take the steps a reasonable person would have taken under the same or similar circumstances to halt the sexual harassment or abuse by Tony Perales against Rosemarie Leija?

The jury returned a verdict for Lieja, awarding $1.4 million in compensatory damages.

Post-verdict, CISD again sought judgment as a matter of law and moved, in the alternative, for remittitur. Among other things, it again maintained that Lieja had not shown intentional discrimination on its part. In denying the motion, the district court changed course and held, in a most comprehensive opinion, that its instructions on liability were unnecessary because CISD was instead strictly liable for

Perales' actions. 887 F. Supp. 947, 953 (W. D. Tex. 1995). However, because the court was concerned that Title IX strict liability might expose school districts to "potential insolvency", it held also that damages should be limited to expenses for medical and mental health treatment and for special education. *Id.* at 956. And, because the damages special interrogatory was not so limited, the court treated CISD's remittitur motion as one for a new trial on damages and granted it. *Id.* at 957. The court later certified its order under 28 U.S.C. § 1292(b) for immediate appeal, and this court granted CISD leave to do so.

II.

Although CISD presents several points, this interlocutory appeal turns on whether the liability standard under Title IX for teacher-student sexual abuse is strict liability; and, if it is not, whether the notice to Mendoza, a teacher, is sufficient to hold the school district liable. In so deciding, we review *de novo* the denial of CISD's motion for judgment as a matter of law, using the same standards as those applied by the district court. *E. g.*, *Conkling v. Turner*, 18 F.3d 1285, 1300-01 (5th Cir. 1994). Such judgment is appropriate if, after viewing the record in the light most favorable to the nonmovant, there is no "legally sufficient evidentiary basis" for a reasonable jury to have found for the prevailing party. *Id.* (quoting FED. R. CIV. P. 50(a)).

Title IX provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681(a). There is an implied right of action under Title IX in favor of victims of discrimination on the basis of sex,

Canon v. University of Chicago, 441 U.S. 677, 709 (1979), and monetary damages may be awarded for its intentional violation, *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-76 (1992).

For purposes of this appeal, we assume that discrimination "on the basis of sex" includes sexual abuse of a student by a teacher. *See id.* at 75. CISD, unlike the *amici*, does not contend otherwise. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 477 (5th Cir.) (en banc) (Jones, J., dissenting) (citing *Franklin* for proposition that school accepting federal funds "render[s] itself potentially liable" to Title IX claims for teacher-student sexual harassment), *cert. denied sub nom. Lankford v. Doe*, 115 S. Ct. 70 (1994). *But see Franklin*, 503 U.S. at 62-63 (limiting question presented to "whether the implied right of action under Title IX ... supports a claim for monetary damages"); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1011 n.11 (5th Cir. 1996) ("[A]ny language in *Franklin* regarding teacher-student sexual harassment is pure *dictum*." *cert. denied*, 65 U.S.L.W. 3033 (U.S. Oct. 7 1996) (No. 96-4).

A.

The district court was the first to adopt strict liability as the standard for school district Title IX liability for teacher-student sexual abuse. Three other standards have been utilized. We summarize them briefly before addressing, and rejecting, strict liability.

The three approaches generally followed are those used for Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*; for Title VII of that Act, 42 U.S.C. §§ 2000 *et seq.*; and pursuant to *Restatement (Second) of Agency* § 219.

a.

CISD urges that Leija must prove that the school district itself engaged in intentional sex-based discrimination. Its basis is the statement in *Cannon* that Title IX was "patterned" after Title VI. *Cannon*, 441 U.S. at 694. As the Court noted, "the two statutes use identical language to describe the benefited class", *id* at 694-95. Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Both statutes also utilize a similar "administrative mechanism" to terminate financial assistance to recipients "engaged in prohibited discrimination". *Cannon*, 441 U.S. at 695-96.

Moreover, out court recently described Title VI as the "model" for Title IX. *Rowinsky*, 80 F.3d at 1012 n.14. And, in *Chance v. Rice University*, 984 F.2d 151, 153 (5th Cir.), *reh'g denied*, 989 F.2d 179 (5th Cir. 1993), a district court's application of Title VI standards to a Title IX claim was not held erroneous. *Chance*, however, involved a claim of discrimination in the promotion and compensation of professors at a university, not teacher-student sexual abuse; furthermore, an imputed liability standard was not at issue. 984 F.2d at 152.

To receive compensatory damages, a Title VI plaintiff must prove discriminatory intent. *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 584 (1993); *id.* at 608 n.1 (Powell, J., concurring); *see Franklin*, 503 U.S. at 70. Consequently, CISD asserts that it cannot be liable absent proof that it actually participated in Perales' discriminatory conduct. *See, e.g., Seamons v. Snow*, 864 F.

Supp. 1111, 1117 (D. Utah 1994), *aff'd in part and rev'd in part*, 84 F.3d 1226 (10th Cir. 1996); *R.L.R. v. Prague Pub. Sch. Dist. I-103*, 838 F. Supp. 1526, 1534 (W.D. Okla. 1993).

b.

Lieja also disclaims the district court's strict liability/limited damages approach. Leija asserts that Title VII liability principles should govern instead. The basis for this approach is the *Franklin* Court's reliance on *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), a Title VII case, in stating that

> [u]nquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Franklin, 503 U.S. at 75.

Under Title VII, the standard for an employer's liability for an employee's conduct depends on the type of sexual harassment at issue. Courts have held an employer strictly liable for "*quid pro quo*" harassment (receipt of a benefit conditioned on submission to sexual conduct). *See Meritor*, 477 U.S. at 70-71; *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982). However, for "hostile environment' harassment (sexual conduct which, *inter alia*, creates an intimidating working environment), an employer is liable only if it knew, or should have known, of that

conduct and did not take appropriate remedial action. *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988).

The district court instructed the jury only on a hostile environment theory; it refused to instruct on a *quid pro quo* theory. We agree that the abuse in issue is the former, not latter, type. Under these principles for hostile environment claims, CISD could be liable if, *inter alia,* it had actual or constructive notice of Perales' actions. *See Kinman v. Omaha Pub. Sch. Dist.* 94 F.3d 463, 469 (8th Cir. 1996); *Preston v. Commonwealth of Va. ex rel. New River Community College*, 31 F.3d 203, 206-07 (4th Cir. 1994).

c.

As a variation of *respondeat superior*, the *Restatement (Second) of Agency* § 219 provides a third possible liability standard: a master is not liable for his servant's torts committed outside the scope of employment unless "the master was negligent or reckless". *Restatement (Second) of Agency* § 219(2)(b) (1957). Under this standard, and because the sexual abuse was not within the scope of Perales' employment as a teacher, CISD would be liable for his actions only if it failed to use reasonable care in preventing, or failing to remedy, a problem that it knew, or should have known, existed. *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990) (interpreting § 219 in Title VII case); *see Rosa H. v. San Elizario Indep. Sch. Dist.*, 887 F. Supp. 140 , 142-43 (W.D. Tex. 1995); *Hastings. v. Hancock*, 842 F. Supp. 1315, 1319 (D.Kan. 1993).

2.

Rejecting the foregoing approaches, the district court adopted strict liability as the Title IX liability standard for

teacher-student sexual abuse. 887 F. Supp. at 954. As noted, it did not do so until *after* the jury rendered its extremely large compensatory damages verdict. *Id.* at 948. No court had previously adopted this approach in imputing liability to a school district for a Title IX hostile environment claim. Moreover, subsequent to the district court rendering its opinion, only one other court had followed suit. *Bolon v. Rolla Pub. Sch.*, 917 F. Supp. 1423, 1427-28 (E.D Mo. 1996). That court also certified its order for interlocutory appeal. *Id.* at 1433-34.

In the case at hand, the district court opined that a student would have difficulty meeting any of the usual liability standards because most sexual abuse "occurs or at least is attempted under cover of secrecy"; and that, "unless the acts of the employees of the district are fully and strictly imputed to the district, Title IX becomes potentially inoperative." 887 F. Supp. at 953. Because of this proof problem, and because "the risk of harm is better placed on a school district than on a young student", the court held CISD strictly liable for Perales' sexual abuse of Leija. *Id.* at 955. For the following reasons, we reach the opposite conclusion.

Our court explained recently that "precedent strongly suggests" that Congress enacted Title IX pursuant to its Spending Clause power, U.S. CONST. art. I, § 8, cl. 1, and not § 5 of the Fourteenth Amendment. *Rowinsky*, 80 F.3d at 1012 n.14. Although the *Franklin* Court had earlier refused to decide this issue, *Franklin*, 503 U.S. at 75 n.8, our court gave cogent reasons for interpreting Title IX in the same way Title VI is interpreted, as Spending Clause legislation, including the identical language of the two statutes, the fact that Title IX was modeled after Title VI, and the Supreme Court's traditional hesitance to "attribut[e]

Congressional intent to act under its authority to enforce the Fourteenth Amendment." *Rowinsky*, 80 F.3d at 1012 n.14 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

In *Pennhurst*, 451 U.S. at 17, the Court described the typical spending power statute as a contract: "[I]n return for federal funds, the States agree to comply with federally imposed condition". But, Congress must be clear and "unambiguous [ ]" about any conditions or obligations it is imposing on the recipient of such funds. *Id.* As the *Pennhurst* Court explained, "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* Thus, in *Pennhurst*, a general statement of legislative findings characterized as a "bill of rights" in the statute was insufficient to impose enforceable obligations on participants in a Spending Clause program. *Id.* at 18-27.

Assuming, *arguendo*, that Title IX is a Spending Clause statute, Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds. Nothing in the statute, however, places a school district on notice that it will be strictly liable for its teachers' criminal acts. In fact, the conditions Congress imposed on Title IX recipients are limited to those anti-discrimination factors found in its sparse wording; there is no mention of liability standards, such as intent, actual knowledge, gross negligence, or lack of due diligence, let alone the imposition of liability without fault. 20 U.S.C. § 1681.

It would be difficult to conclude that Title IX, which contains no whisper of strict liability, creates this enforceable obligation, whereas the provision at issue in *Pennhurst*, which was part of the text of the statute, did not. *Pennhurst*,

451 U.S. at 13-14, 18-27. And, if strict liability were the standard, it cannot be that a school district that chooses to accept federal monies can be said to have made a "knowing[ ]" choice, "cognizant of the consequences of [its] participation", when the statute governing the receipt of those funds is completely silent about a financially devastating consequence of that participation. Simply put, strict liability is not part of the Title IX contract.

In addition, there is no sound policy reason to hold a school district financially accountable, through strict liability, for the criminal acts of its teachers. As noted, in recasting an argument frequently made in support of imposing strict liability on product manufacturers, *see, e.g., Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963); *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring), the district court explained that "the risk of harm is better placed on a school district than on a young student." 887 F. Supp. at 955.

But, along this same line, one reason courts and state legislatures have so allocated risk to product manufacturers is because they are better able to spread liability costs among consumers by raising the price of their products. *E.g., Escola*, 150 P. 2d at 441 (Traynor, J., concurring). A school district should not be required to perform a comparable task, even if it could. A school district's "products" are its students; there is no "price" to raise. Instead, public schools are funded typically by a combination of federal and state funds and property taxes levied by the local governing body. We refuse to impose the necessity of a "Title IX assessment" in order to spread the risk of million-dollar verdicts. As horrible a crime as child abuse is, we do not live in a risk-free society; it contorts "public policy" to suggest that communities should be held financially responsible in this manner (strict liability) for

such criminal acts of teachers.

Continuing with this product manufacturer analogy, another reason behind product manufacturer strict liability is that the manufacturer is in a better position than a consumer to search for and discover defects in design or manufacture. *See, e.g., Escola*, 150 P.2d at 440-41 (Traynor, J., concurring). But, there is no product for a school district to design, test or inspect. Again, its "products" are its students; they are not the offending item. And, just as is a product manufacturer, a school district is limited in what it can prevent through careful screening and monitoring of its employees, both before and after hiring them. Human beings are inherently unpredictable, making it impossible for a school district to discover potential human "defects" the way, for example, that a manufacturer, for its products, can design against defects, or inspect for them on an assembly line. In addition, the Constitution and state and federal law limit the extent to which a school district can examine, inquire about, or investigate its employees and their backgrounds and characteristics.

Likewise, as the district court noted, teacher-student sexual abuse is conducted in secret, making it difficult, if not impossible, to detect without being told about it. Obviously, immediate and adequate notice is one of the best means of stopping abuse and removing (*and convicting*) the abuser. In fact, as a matter of public policy, it may well be that requiring knowledge by the school district, often acquired by being told about such abuse, as a condition to recovery of damages will result in much quicker and greater protection not only to the person being abused and providing notice, or on whose behalf it is given, but will also better protect or otherwise benefit those who may then be undergoing abuse from that, or another, teacher. This additional benefit applies equally to those who might be otherwise subject to

abuse in the future from that teacher, as well as from others.

The district court suggests that strict liability will "heighten [ ] the vigilance of the district and cause [ ] employees at all levels of the system to be alert to the problem." 887 F. Supp. at 955. It is difficult to believe, following lengthy and nationally publicized child abuse trials, the otherwise heightened awareness of child abuse, and the increased filings of Title IX actions for student abuse, that any school district or teacher is not already extremely alert to the problem of teacher-student sexual abuse. But in any event, as explained, such vigilance, alertness, and awareness are insufficient to shield a school district from potential financial ruin under the district court's strict liability approach, even with the limited damages it couples to that standard. Strict liability converts the school district from being the educator of children into their insurer as well. And, if it is their insurer, it is most arguable that its role as educator -- needed now more than ever -- will suffer, and suffer most greatly.

It is true that the Supreme Court has found an implied private cause of action in Title IX, even though the statute is silent. *Cannon*, 441 U.S. at 709. And, it is also true that the Court discerned an intent on the part of Congress to provide all appropriate remedies for a Title IX violation, although the statute makes no mention of them. *Franklin*, 503 U.S. at 71-75. But, strict liability is a step too far; we will not take it.

B.

As discussed *infra*, and based on the facts in this case (especially because the only notice was to another teacher), it is not necessary now to move beyond our rejection of strict liability and adopt a liability standard for Title IX cases of

the type at hand. Leija's Title IX claim fails under each of the three types commonly applied.

1.

Of course, if the appropriate standard were analogous to Title VI, even notice, absent direct involvement by the school district, would not impute liability to the district. *See R.L.R.*, 838 F. Supp. at 1534. It is undisputed that there was no such involvement by CISD. Therefore, the Title IX claim would fail under this standard. We turn to how it would fare under a liability standard akin to Title VII or § 219 of the *Restatement (Second) of Agency*. (Needless to say, the brevity of this Title VI analogy, especially as compared to the length of the discussion that follows, should not be understood to mean that, for purposes of this opinion, we view it as having less validity than those other two standards.)

Under the standard for Title VII or § 219, a school district would be liable if it knew, or should have known, of the teacher's conduct and failed to take remedial action. *See DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir.) (Title VII), *cert. denied*, 116 S. Ct. 473 (1995); *Hirschfeld*, 916 F.2d at 577 (§ 219). Restated, under either standard, actual or constructive notice, *inter alia*, would constitute a sufficient basis for Title IX liability. Both CISD and Leija agree on this point.

a.

Therefore, under either standard, the question then becomes: To whom must such notice be given? CISD asserts that, at the least, a management-level employee must have notice of the teacher's actions. Leija counters that, as long as the student reports the actions to someone "appropriate"

to receive the complaint, the notice element has been satisfied.

In the Title VII context, our court has explained that an employer has *actual* notice of harassment when an employee complains to "higher management". *Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989); *see also Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) (discussing failure of plaintiff to complain to "company hierarchy"). A Title VII plaintiff can show *constructive* notice by "showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge". *Waltman*, 875 F.2d at 478 (quoting *Henson*, 682 F.2d at 905). (As discussed *infra*, there is no evidence that, at the time of the assaults on Leija, Perales' conduct was so pervasive that a reasonable juror could infer that CISD had knowledge of the situation.)

Other circuits have adopted a similar definition for Title VII actual notice. *Nichols*, 42 F.3d at 508 ("The proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known...."); *Hall*, 842 F.2d at 1015-16 (explaining that employer had actual notice because foreman was told of harassment); *Katz v. Dole*, 709 F.2d 251, 255-56 (4th Cir. 1983) (describing personnel that put employer on notice of harassment as "supervisory"); *Henson*, 682 F.2d at 905 ("The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management ....").

Likewise, under § 219, courts require that a plaintiff notify management-level employees before an employer can be said to have actual knowledge. *See Hirschfeld*, 916 F.2d at 577 (citing *EEOC V. HACIENDA HOTEL*, 881 F.2d 1504, 1516 (9th Cir. 1989)).

There is no reason to define actual notice differently in the Title IX context. In fact, the one Title VII case cited by Leija to support her "appropriate employee" contention described the personnel that the plaintiff notified as "supervisory". *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 380 (W.D.N.C. 1988). Moreover, it makes little sense, on the one hand, to make liability contingent, *inter alia*, on whether the employer (school district) takes "prompt remedial action", *see DeAngelis*, 51 F.3d at 593, yet, on the other hand, define "employer" so broadly as to include personnel who have no authority to take such action. Therefore, before the school district can be held liable under Title IX for a teacher's hostile environment sexual abuse, someone in a management-level position must be advised about (put on notice of) that conduct, and that person must fail to take remedial action.

For purposes of this appeal, we need not decide, and thus leave for another day, the question of whether the appropriate (or lowest level) management-level person to be notified is a Title IX coordinator, vice-principal, principal, superintendent, or school board member. *But cf. Rowinsky*, 80 F.3d at 1021 (Dennis, J., dissenting) (student-student sexual harassment is actionable under Title IX if "board had knowledge of the harassment and failed to take appropriate corrective action") (emphasis added). Obviously, that question is strongly linked to the facts and circumstances, including applicable state law, of each case. It *is* clear, however, that, to even begin to qualify as "management-level", a person must have some authority over employees, including, perhaps, the power to hire, fire, or discipline. This condition stems from case law and the language of Title VII itself.

Title VII defines an "employer" to include all "agent[s]", but *not* all "employees", of the employer. 42

U.S.C. § 2000e(b). The Supreme Court focused on this distinction in *Meritor Savings Bank*, 477 U.S. at 72: "Congress' decision to define 'employer' to include 'any agent' of an employer ... surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." Our court is well aware of this distinction. *See Moham v. Steego Corp.*, 3 F.3d 873, 876 (5th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994).

Courts have interpreted the term "agent" to mean someone who "serves in a supervisory position and exercises significant control over ... hiring, firing, or conditions of employment". *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (quoting *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989) *vacated in part*, 900 F.2d 27 (4th Cir. 1990); *see also Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994). In fact, the Fourth Circuit has explained, "[The agent] need not have ultimate authority to hire or fire to qualify as an employer, as long as he or she has significant input into such personnel decisions". *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989).

This definition of "employer" (including agents) is synonymous with the understanding our court had of "employer" in *DeAngelis v. El Paso Municipal Police Officers Ass'n*, when it listed as one of the elements of a Title VII plaintiff's *prima facie* case for hostile environment that "the employer knew or should have known of the harassment and failed to take prompt remedial action". *DeAngelis*, 51 F.3d at 593. Accordingly, the term "higher-management personnel" includes only those individuals with some degree of job-related authority over other employees.

Thus, in *Nash v. Electrospace System, Inc.*, our court

explained that an employer did not know, and could not have known, of the harassment "until [the plaintiff] complained to those *with authority to address the problem*". *Nash*, 9 F.3d at 404 (emphasis added). And, in *Hall v. Gus Construction Co.*, the Eighth Circuit found that a construction company had actual notice of a hostile environment when a foreman had witnessed and received complaints about the sexually harassing conduct. *Hall*, 842 F.2d at 1016.

In sum, if Title VII or § 219 principles are applicable for Title IX liability, the school district does not have actual knowledge of hostile environment sexual harassment until someone with authority to take remedial action is notified. Again, it may well be that that someone must be a member of the school board.

b.

In any event, it is clear that Mendoza, the teacher put on notice, did not have the requisite authority. At the elementary school, she served only in the capacity of a classroom teacher. Mendoza did not serve on the school board or as a superintendent, assistant superintendent, principal, or assistant-principal. And, the CISD student handbook designated the *assistant superintendent*, not Mendoza, as the CISD Title IX coordinator (and the person to receive student complaints). Mendoza simply had no job-related authority over Perales or, for that matter, any other teacher. As a final indicator, we note that, when asked at trial whether she was an appropriate person to receive a student's complaint of sexual abuse and harassment, Mendoza invoked her Fifth Amendment rights.

Accordingly, we apply these assumptions and conclusions to this record to determine whether the school district had the requisite actual or constructive notice. As

stated, we hold that it did not.

Leija was not in Perales' gym/health class after the 1989-90 school year; and, in early 1991, during Leija's third grade year, she and her family left Canutillo. Perales, however, continued to sexually abuse his students. In October 1990, a parent complained to the assistant-principal at the elementary school that Perales had sexually molested her daughter. The allegation was investigated, and Perales was warned about his interaction with the students. In February 1991, four more girls complained of sexual abuse, this time to the principal, who promptly reported the incidents to the CISD superintendent. CISD immediately suspended Perales. Law enforcement officials investigated the matter, and Perales was subsequently indicted and convicted of sexual abuse of a child, whereupon CISD terminated him.

Therefore, concerning the time frame during which the sexual abuse of Leija occurred, the record reflects the following: neither Leija nor her mother told anyone at the school besides Mendoza (a teacher) what Perales was doing; Mendoza was not at management-level -- she did not have any authority over Perales or other authority, including to take the requisite remedial action, so that the notice to her did not constitute notice to CISD; no member of the school board, the superintendent, the assistant superintendent, the principal, the assistant-principal or any other management-level personnel were notified of Perales' actions; and, there was no evidence that his conduct was then so pervasive that a reasonable juror could conclude that CISD "should have known" of the abuse. On these facts, CISD had neither actual nor constructive notice of Perales' sexual abuse of Leija. Consequently, for the liability standards akin to Title VII or § 219, as with that discussed earlier for Title VI, the Title IX claim was insufficient as a matter of law.

III.

For the foregoing reasons, the Title IX claim fails. (Accordingly, we do not address the damages issues.) Therefore, we REVERSE the denial of CISD's motion for judgment as a matter of law on that claim, and REMAND for entry of judgment in favor of the school district.

REVERSED and REMANDED

DENNIS, Circuit Judge, dissenting:

I respectfully dissent.

First, I disagree with the majority's failure to consider and follow the substantial jurisprudential and regulatory developments that have taken place under Title IX since this court visited this fast changing legal area in *Rowinsky v. Bryan ISD*, 80 F.3d 1006 (5th Cir. 1996). I am persuaded by the new developments that the substantive standards that have evolved under Title VII should be applied in actions for monetary damages under Title IX based on either the sexual harassment of a student by a school employee or the sexual harassment of a student by his or her peers.

Second, I could have agreed with the majority's result had this case presented only the issue of whether a complaint of hostile environment sexual harassment was made to management-level school employees. However, the certified order appealed from fairly includes other issues that should be addressed by this court, *viz.*, (1) whether the complaints by the second grader and her mother to her primary or home room teacher about her sexual molestation by her male health and physical education teacher constituted sufficient notice because the school district failed to provide an adequate complaint and grievance procedure as required by Title IX

regulations but instead issued a school booklet directing students and parents to direct complaints to the child's primary or home room teacher; (2) whether a reasonable trier of fact could have found from the evidence that the male teacher's conduct constituted quid pro quo harassment, as well as hostile environment harassment, of the female second grader, for which the school district is liable regardless of whether it knew or should have known or approved of the harassment.

Finally, applying the recently developed sexual harassment precepts, I conclude that (1) the plaintiffs-appellees presented sufficient evidence from which a reasonable trier of fact could conclude that the school district had notice of the sexual harassment, which it failed to take adequate remedial steps to arrest and prevent, and therefore could be held liable for damages caused by hostile environment discrimination; and (2) in the alternative, a reasonable trier of fact could find that the male teacher's conduct constituted quid pro sexual harassment of the female second-grade student and, accordingly, if judgment is not rendered at this level for the plaintiff-appellees, the case should be remanded for further proceedings on the quid pro quo issue.

Moreover, in either event, this court should hold that the trial court exceeded its authority in denying the plaintiff plenary damages and in imposing restrictions upon their recovery not provided by law.

JURISPRUDENTIAL DEVELOPMENTS

Title IX provides that "no person in the United States shall, on the basis of sex, ... be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 USC § 1681 (a). In *Franklin v.*

Gwinnett County Pub. Sch., 503 U.S. 60 (1992), the Supreme Court recognized that Title IX affords an implied private cause of action for money damages in cases of intentional sexual discrimination; and that a teacher's sexual harassment and abuse of a student because of the student's sex constitutes sexual discrimination. *Id.* 503 U.S. at 74-75, (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

In reviewing claims of sexual discrimination brought under Title IX, whether by students or employees, courts have generally adopted the same legal standards that are applied to such claims under Title VII. Student Claims: *Kinman v. Omaha Public School District*, 94 F.3d 463, 467-68 (8th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996); *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *vacated, pending reh'g en banc*; *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995); *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995); *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994); *Roberts v. Colo. State Bd. of Agriculture*, 998 F.2d 824, 832 (10th Cir.), *cert. denied*, --- U.S. ---, 114 S.Ct. 580 (1993); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, (W.D. Mo. 1995); *Sharif by Salahuddin v. NYS Ed. Dep.*, 709 F. Supp. 345 (S.D.N.Y. 1989); *Moise v. Temple Univ. Sch. Med.*, 613 F. Supp. 1360 (E.D.Pa. 1985), *aff'd*, 800 F.2d 1136 (3d. Cir. 1986); Employee Claims: *Brine v. Univ. of Iowa*, 90 F.3d 271, 275-6 (8th Cir. 1996); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896-98 (1st Cir. 1988); *Preston v. Comm. of Va.*, 31 F.3d 203 (4th Cir. 1994); *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987); *cf. Doe v. Taylor*, 975 F.2d 137, 149 (5th Cir. 1992) ("[T]here is no meaningful distinction between the work environment and school environment which would forbid such discrimination

yin the former context and tolerate it in the latter.")

The circuits addressing the elements of a student's sexual harassment claim based on hostile educational environment agree that the plaintiff must prove: (1) that the student belongs to a protected group; (2) that the student was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of the student's education and create an abusive educational environment; and (5) that some basis for institutional liability has been established. *Kinman v. Omaha Public Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996); *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *vacated, pending reh'g en banc*; *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995).

A majority of those circuits have held that in order to establish the fifth element--*viz.*, that there is a basis for the educational institution's liability--Title VII principles apply: (1) The plaintiff must show that the school knew or should have known of the harassment in question and failed to take prompt remedial action; and (2) the student can satisfy the "knew or should have known" requirement by demonstrating that adequate information concerning the harassment was communicated to management-level school employees or by showing that the pervasiveness of the harassment gives rise to a reasonable inference of knowledge or constructive knowledge. *Kinman v. Omaha Sch. Dist.*, *supra*; *Davis v. Monroe County Bd. of Educ.*, *supra.*; *Murray v. New York Univ. College of Dentistry*, *supra*. *Accord Doe v. Petaluma City Sch. Dist.*, 1996 WL 432298 (N.D.Cal. 1996); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288 (N.D.Cal. 1993); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193 (N.D. Iowa 1996); *Bruneau v. South*

Kortright Central Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); *Linson v. Trustees of the Univ. of Penn.*, 1996 WL 479532 (E.D.Pa.). The court in *Seamons v. Snow*, *supra*, disposed of the plaintiff's claim solely on the basis of his failure to allege facts constituting sexual discrimination without addressing the notice issue.

That Title VII standards should be applied in analyzing a Title IX sexual harassment claim by a student is also evident from the decisions of the Supreme Court. Although the Court did not expressly address the issue in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), in holding that Title IX authorizes awards of compensatory damages to Title IX plaintiffs generally, the Court invoked Title VII authority and principles. *Franklin* involved a high school student's allegations that she had been sexually harassed and assaulted by a teacher and that school officials with actual knowledge of the teacher's misconduct had failed to intervene. *Id.*, 503 U.S. at 64-65. In rejecting the argument that the specific language of Title IX did not give educational institutions sufficient notice of their liability for damages for such intentional discrimination, the *Franklin* Court stated:

> Unquestionably, Title IX placed on [such institutions] the duty not to discriminate of the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav[ings] Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

Id., 503 U.S. at 75. The Court's citation to *Meritor Savings Bank*. a Title VII case, in support of *Franklin's* central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII. *See Murray v. New York Univ. College of Dentistry*, 57 F.3d at 248-49.

Furthermore, the Supreme Court has consistently, both before and after *Franklin*, used the term "intentional" to distinguish disparate treatment discrimination, including hostile environment discrimination, from unintentional disparate impact discrimination. Thus, by stating that money damages may be awarded only for intentional violations of Title IX, the Supreme Court did not intend to foreclose student victims from such recovery for sexual harassment amounting to either quid pro quo or hostile environment discrimination under principles modeled on the Title VII standards.

In *Guardians Ass'n v. Civil Serv. Comm's of New York*, 463 U.S. 582 (1983), the Supreme Court held, in a Title VI action prior to *Franklin*, that monetary damages should not be awarded under Title VI for unintentional disparate impact discrimination. Justice White, announcing the judgment of the Court, explicitly noted that the holding that damages were not available for unintentional discrimination based on disparate impact left open the issue of whether money damages would be appropriate in cases of "intentional discrimination." *Id.* at 597. Thus, Justice White clearly implied that "intentional discrimination" is discrimination other than that based on disparate impact. This section of Justice White's opinion was joined by Justice Rehnquist. Additionally, the distinction between intentional discrimination and unintentional disparate impact discrimination was implicit in the concurring opinions and

dissents of Justices O'Connor, *id.* at 613, Marshall, *id.* at 616, and Stevens, Brennan and Blackmun, *Id.* at 645. Therefore, a majority of the *Guardians* Court implicitly but clearly defined "intentional discrimination: as discrimination other than disparate impact discrimination. *Doe v. Petaluma City Sch. Dist.*, 1996 WL 432298 at *3 (N.D.Cal. July 22, 1996).

Subsequent to *Franklin*, the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), confirmed the distinction it draws between intentional discrimination (including hostile environment sexual harassment) and unintentional disparate impact discrimination. The Civil Rights Act of 1991 created a right to recover compensatory damages in cases of "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)" prohibited by Title VII. 42 U.S.C. § 1981(a). This amendment to Title VII sets up the same dichotomy as did the Supreme Court in *Franklin* and *Guardians*, for it limits the award of money damages to cases involving "intentional discrimination." In *Landgraf* the Supreme Court, in a Title VII case involving a hostile work environment claim, held that the provisions affording the right to such money damages do not apply to a Title VII case that was pending on appeal when the statute was enacted. The Supreme Court, in its discussion of whether the amendment should be given retroactive application, clearly assumed that "intentional discrimination" would include hostile work environment discrimination based on co-worker harassment. *Landgraf*, 511 U.S. at 249-50. The Court's assumption evidently was based on its own classification of hostile environment discrimination as "intentional discrimination." For example, the Court stated that the amendment "confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged." *Id.* at

283. Thus the *Guardians* and *Landgraf* opinions indicate that when the Supreme Court referred to "intentional discrimination" in *Franklin*, it was referring to any form of discrimination other than disparate impact discrimination. In other words, "intentional discrimination: includes hostile work environment discrimination. *See Doe v. Petaluma City Sch. Dist.*, 1996 WL 432298 at *7-8 (N.D.Cal. July 22, 1996) (citing also as earlier authority *Henson v. City of Dundee*, 682 F.2d 897, 902-05 n.11 (11th Cir. 1982); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("[T]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course")).

This background explains why recent cases under the 1991 amendments to Title VII simply characterize hostile work environment discrimination as a species of intentional discrimination, without discussion. *Petaluma*, 1996 WL 432298 at *10 (citing *Townsend v. Indiana Univ.*, 995 F.2d 691 (7th Cir. 1993); *Raney v. Dist. of Columbia*, 892 F.Supp. 283 (D.D.C. 1995); *Sassaman v. Heart City Toyota*, 879 F.Supp. 901 (N.D.Ind. 1994); *Splunge v. Shoney's, Inc.*, 874 F.Supp. 1258 (M.D.Ala. 1994); *Preston v. Income Producing Management, Inc.*, 871 F.Supp. 411 (D.Kan. 1994); *Meadows v. Guptill*, 856 F.Supp. 1362 (D.Ariz. 1993); *Powell v. Las Vegas Hilton Corp.*, 841 F.Supp. 1024 (D.Nev. 1992)). "If there was ambiguity regarding whether hostile environment claims were a species of intentional discrimination, this ambiguity has now been resolved by the 1991 amendments and the cases applying them." *Id.*

Moreover, the recent draft guidances issued by the Office of Civil Rights of the Department of Education discussed below confirms that the majority of the courts are

correct in applying the standards developed under Title VII in the adjudication and review of students; claims based on Title IX violations involving peer or school employee hostile environment discrimination.

REGULATORY DEVELOPMENTS

In *Rowinsky* we recognized that "[w]hen interpreting Title IX, we accord the OCR's [Office of Civil Rights of the Department of Education] interpretations appreciable deference." 80 F.3d at 1015 n.20 (citing *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993)), which elaborated:

> [W]e treat [the Department of Education], acting through its OCR, as the administrative agency charged with administering Title IX.
>
> Recognizing the agency's role has important practical and legal consequences. Although [the Department] is not a party to this appeal, we must accord its interpretation of Title IX appreciable deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); *see also Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965) (noting that the Supreme Court "gives great deference to the interpretation given the statute by the officers or agency charged with its administration").

Nevertheless, the *Rowinsky* majority concluded that 34 C.F.R. § 106.31[5] cannot reasonable be read to prohibit a

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[5] Subpart D--Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

recipient from knowingly allowing peer sexual harassment of students. 80 F.3d at 1015. The majority inferred as much because the most definitive statement by the OCR on sexual harassment at that time left unresolved the issue of peer sexual harassment. *Id.*

Subsequent to the handing down of *Rowinsky* on April 2, 1996, however, the OCR issued (1) on August 16, 1996, a draft document on Sexual Harassment Guidance : Peer Sexual Harassment [Guidance]," providing educational institutions with information regarding the standards used by

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§106.31 Education Programs and Activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance .....

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

* * *

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

* * *

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

OCR to investigate and resolve cases involving claims that peer sexual harassment has created a hostile environment in violation of Title IX. 61 Fed. Reg. 42,728 (August 16, 1996); and (2) on October 4, 1996, a draft document on "Sexual Harassment Guidance: Harassment of Students by School Employees," providing educational institutions with information regarding the standards used by the OCR to investigate and resolve cases involving claims that sexual harassment of students by school employees has created a hostile environment in violation of Title IX. 61 Fed. Reg. 52,171 (October 4, 1996). (**N.B.** The OCR attached both draft documents as appendices to 61 Fed. Reg. 52,171.) The OCR invited interested parties to comment on the clarity and completeness of the draft guidances. The periods for comment on these draft documents have elapsed. The OCR is proceeding to combine the substance of the two drafts in one Guidance that will be issued in the very near future.

In effect, the new OCR Guidance will provide that, in accordance with the OCR's longstanding nationwide practice, the legal principles developed under Title VII should be applied in determining when a hostile environment discrimination violation has occurred because of sexual harassment of a student by either peers or a school employee. In the more recent draft document the OCR stated:

> Consistent with the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (holding that a student may sue a school district for damages based on sexual harassment by a teacher), OCR has applied Title IX to prohibit sexual harassment of students by school employees. The standards in the Guidance reflect OCR's longstanding nationwide practice and reflect well established legal principles developed under Title

VII of the Civil Rights Act of 1964, which prohibits gender discrimination in employment.

[61 Fed.Reg. at 52,172]

Below are highlights of the two Guidance drafts. The material is lifted as almost verbatim excerpts from the drafts. Footnote material has been merged with text material in many instances. Citations of authorities have been selectively drawn from the footnotes. This presents a quick, incomplete view of some of the significant provisions.

School Employee Harassment

According to the OCR draft Guidance, sexual harassment of students by a school employee is a form of prohibited sex discrimination in the following circumstances:

> Quid Pro Quo Harassment--A school employee explicitly or implicitly conditions a student's participation in an education program or school activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors; or other verbal or physical conduct of a sexual nature. Quid pro quo harassment is equally unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm. [61 Fed.Reg. at 52,172]
>
> Hostile Environment Harassment--Sexually harassing conduct by an employee (that can include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature) is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an

education program or activity, or to create a hostile or abusive educational environment. [61 Fed.Reg. at 52,172].

A school's liability for sexual harassment by its employees is determined by application of agency principles, *see Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992), i.e., by principles governing the delegation of authority to or authorization of another person to act on one's behalf. Accordingly, a school will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986); *see also Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); EEOC Notice N-915-050, March 1990, at 21; *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 752 (E.D. Va. 1995). Under agency principles if a teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee "stands in the shoes" of the school and the school will be responsible for the use of its authority by the employee/agent. *Kadiki*, 892 F.Supp. at 754-55 [61 Fed.Reg. at 52, 172-3].

A school will also be liable for hostile environment sexual harassment by its employees, i.e., for harassment that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive environment if the employee--(1) Acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); *see* Restatement (2d) Agency § 219(2)(d); *Martin v. Cavalier*

Hotel Corp., 48 F.3d 1343, 1352 (4th Cir. 1994); or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution. EEOC Policy Guidance on Current Issues of Sexual Harassment at 28; *Martin v. Cavalier Hotel Corp.*, 48 F.3d at 1352; *Karibian*, 14 F.3d at 780; *Hirshfeld v. New Mexico Corrections Dept.*, 916 F.2d 575, 579 (10th Cir., 1990). In many cases the line between quid pro quo and hostile environment discrimination will be blurred, and an employee's conduct may constitute both types of harassment. [*Id.* at 52,173].

Even in situations not involving (i) quid pro quo harassment, (ii) creation of a hostile environment through an employee's apparent authority, or (iii) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority, a school will be liable for sexual harassment of its students by its employees if the school has notice of the harassment (i.e., knew or should have known of the harassment), but failed to take immediate and appropriate steps to remedy it. *Cf. Karibian*, 14 F.3d at 780. Determining when a school has notice of sexual harassment is discussed in the Peer Harassment Guidance. [61 Fed.Reg. at 72,173] (discussed *infra* at p. 18 *et seq.*).

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination. 34 CFR 106.8(a) and (b)[6]. If a school fails to do so, it will be liable

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[6] § 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each

for the lack of procedures regardless of whether sexual harassment occurred. In addition, if OCR determines that the harassment occurred, the school may be in violation of Title IX as to the harassment, under the agency principles previously discussed, because a school's failure to implement effective policies and procedures against discrimination may create apparent authority for school employees to harass students. EEOC Policy Guidance at p.25 ("*** in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.") [61 Fed.Reg. at 52,173].

In all cases of alleged harassment by employees investigated by OCR, OCR will determine whether a school has taken immediate and appropriate steps reasonably calculated to end any harassment that has occurred, remedy its effects, and prevent harassment from occurring again. If the school has done so, OCR will consider the case against that school resolved and will take no further action. This is

recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing from prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

true in cases in which the school was in violation of Title IX, as well as those in which there has been no violation of federal law. However, schools should note that the Supreme Court has held that, should a student file a private lawsuit under Title IX, monetary damages are available as a remedy if there has been a violation of Title IX. *Franklin*, 503 U.S. at 76. Of course, a school's immediate and appropriate remedial actions are relevant in determining the extent and nature of damages suffered by a plaintiff. [61 Fed.Reg. at 52,173].

Although generally, a plaintiff must prove that the sexual harassment is unwelcome in order to state an actionable claim, if elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. Because students may be encouraged to believe that a teacher has absolute authority over the operation of his or her classroom, a student may not object to a teacher's sexually harassing comments during class. *See Leija v. Canutillo ISD*, 887 F. Supp. 947, 945 (N.D. Tex. 1993) ("young children, taught to respect their teachers and follow their teacher's request, often do not know what to do when abuse occurs") [61 Fed.Reg. at 52,173].

In determining whether an employee's sexual harassment of a student created a hostile environment, i.e., whether it was sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or create a hostile or abusive educational environment, OCR considers the factors discussed in the Peer Harassment Guidance. [61 Fed.Reg. at 52,175-83].

Peer Harassment

The Peer Harassment draft guidance discusses the analysis that the OCR follows, and that recipients of federal funding should use, when investigating allegations that sexual harassment of a student or students by another student or group of students (peer harassment) has created a hostile environment at an educational institution that receives federal financial assistance. [61 Fed.Reg. at 52,175].

Under Title IX and its implementing regulations, no individual may be discriminated against on the basis of sex in educational programs receiving federal financial assistance. 20 USC § 1681 *et seq.*; 34 CFR § 106.31(b), *supra* n.1. In analyzing sexual harassment claims, the Department also applies, as appropriate to the educational context, many of the legal principles applicable to sexual harassment in the work place, developed under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-2(a). *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (applying Title VII principles in determining that a student was entitled to protection from sexual harassment by a teacher in school under Title IX); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) (same); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1571-72 (N.D. Cal. 1993) (same), *rev'd in part on other grounds*, 54 F.3d 1447 (9th Cir. 1995). [61 Fed.Reg. at 52,175].

In addition, many of the principles applicable to racial harassment under Title VI of the Civil Rights Act, 42 USC § 2000d *et seq.*, and Title VII also apply to sexual harassment under Title IX. Indeed, Title IX was modeled on Title VI. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694

(1979).[7]
[61 Fed.Reg. at 52,175 n.2].

Peer sexual harassment is a form of prohibited sex discrimination where the harassing conduct creates a hostile environment. *See Franklin*, 503 U.S. at 75; *Bosley v. Kearney R-ISD*, 904 F.Supp. 1006, 1023 (W.D.Mo. 1995); *Burrow v. Postville CSD*, 1996 U.S. Dist. LEXIS 9147 at *34 (N.D. Iowa June 17, 1996); *Oona R.-S v. Santa Rosa City Schools*, 890 F.Supp. 1452 (N.D.Cal. 1995); *Davis v. Monroe County Bd. of Ed.*, 74 F.3d 1186, 1193 (11th Cir. 1996), *vacated, reh'g granted; cf. Murray v. NYU*, 57 F.3d at 249. Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to act and permitting the harassment to continue once a school official knows that it is happening. [61 Fed.Reg. at 51,180 n.3].

A school will have notice of a hostile environment when it knew or should have known of the harassment. *Davis v. Monroe County*, 74 F.3d at 1194, and other authorities including *Rosa H. v. San Elizario ISD*, 887 F.Supp. 140, 143 (W.D.Tex. 1995) ("[T]he school district is in the best position to be on the lookout for discriminatory conduct * * * A 'knew or should have known' requirement mandates that the school district monitor its employees and students and prevents a situation where the district, through its employees or policies, turns a blind eye toward discriminatory conduct.")]. Moreover, schools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination by other students, including sexual

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[7] For information on racial harassment, see the Department's Notice of Investigative Guidance for Racial Harassment, 59 Fed.Reg. 11,448 (1994).

harassment. 34 CFR § 106.8(b). [61 Fed.Reg. 52,178-79].

A school will be liable for the conduct of its students that creates a sexually hostile environment where (i) a hostile environment exists, (ii) the school knows ("has notice") of the harassment, and (iii) the school fails to take immediate and appropriate steps to remedy it. [61 Fed.Reg. at 52,177] [Citing again *Franklin*, *Bosley*, *Doe*, *Burrow*, *Oona R.-S*, *Davis*, and *Murray*, cited above.]

A recipient can receive notice of peer sexual harassment creating a hostile environment in many different ways. Because schools are required to have Title IX grievance procedures, a student may have filed a grievance or complained to a teacher about fellow students sexually harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student affairs. An agent or responsible employee of the institution may have witnessed the harassment. The recipient may receive notice in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The recipient also may have received notice from flyers about the incident[s] posted around the school. *See* Racial Harassment Guidance, 59 Fed. Reg. at 11,450 (discussing how a school may receive notice). [61 Fed.Reg. at 52,178].

Constructive notice exists when the school "should have" known about the harassment--when the school would have found out about the harassment through a "reasonably diligent inquiry." *See Yates v. Avco Corp.*, 819 F.2d 630, 634-36 (6th Cir. 1987) (Title VII case); *Katz v. Dole*, 709 F.2d 251, 156 (4th Cir. 1983) (same); Racial Harassment Investigative Guidance, 59 Fed. Reg. at 11,450. In some

cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment--where the harassment is widespread, openly practiced, or well-known to students and staff (such as sexual harassment occurring in hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision). [61 Fed.Reg. at 52,177].

CONCLUSIONS

I respectfully disagree with the majority opinion's failure to apply Title IX as impliedly interpreted by the Supreme Court in *Franklin v. Gwinnett County Public Schools*, as implemented by 34 CFR 106.1 *et seq.*, and as interpreted by the OCR's draft Guidances on Harassment of Students by School Employees, 61 Fed.Reg. at 52171-52183 (October 4, 1996). In my opinion these authorities strongly indicate that we should apply the standards developed under Title VII in the adjudication and review of a student's claim of hostile environment sexual discrimination by a school employee under Title IX. All of the other circuits which have addressed this question have done so. *Kinman v. Omaha Public Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996); *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *vacated, pending reh'g en banc*; *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995). The majority opinion does not offer an cogent legal reason for its failure to recognize and follow these authorities. Furthermore, although this court may not have been aware of the OCR's draft guidances when the case was argued, now that we aware of them we should give great deference to the interpretations of the OCR as the administrative agency charged with administering Title IX. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Udall v. Tallman*, 380 U.S. 1 (1965); *Rowinsky*

v. Bryan ISD, 80 F.3d 1006 (5th Cir. 1996).

Accordingly, in a Title IX action based on hostile environment discrimination caused by a school employee's sexual harassment of a student, the plaintiff must establish a basis for the educational institution's liability. This requires the plaintiff to show that the school knew or should have known of the harassment in question and failed to take prompt remedial action. Ordinarily, the plaintiff can satisfy the "knew or should have known" requirement by demonstrating that information of the harassment was communicated to management-level school employees or by showing that the pervasiveness of the harassment gave rise to an inference of actual or constructive knowledge. In the present case, because it appears that the only school employee who received any communication or information about the harassment was a teacher, not a management-level school employee, the plaintiffs would have failed to prove their hostile environment claim, had the school district complied with its obligations under the Title IX regulations.

Schools are required by the Title IX regulations, however, to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination. 34 CFR § 106.8(b); 61 Fed.Reg. at 52,173. If a school fails to do so, it will be liable under Title IX for the lack of grievance procedures, regardless of whether sexual harassment occurred. *Id.* In addition, if OCR determines that harassment occurred, the school may be in violation of Title IX as to the harassment under agency principles because the failure to implement effective policies and procedures against discrimination may create apparent authority for school employees to harass students. *Id.*; *see also* EEOC Policy Guidance at 25. Because we owe accord

great deference to the interpretation of Title IX by the OCR due to its role as the administrative agency charged with administering the statute, these principles should be applied to the evidence in the present case to determine whether notice of the harassment should be imputed to the school district.

The plaintiffs' brief and the District Court's order point to evidence from which a reasonable trier of fact could conclude that notice of the harassment should be attributed to the school district. There was evidence that prior to the incidents in question the school district had no policy directing student and parents as to how to make a report of sexual harassment. The Canutillo Elementary Student Handbook directed students or parents who had any complaint to first take it up with the student's primary teacher. Rosemarie's understanding was that she should direct any complaints to her primary teacher. The evidence further indicated that Rosemarie did not know where the office of the superintendent was located or that there was a Title IX coordinator ostensibly responsible for investigating allegations of child abuse. In its memorandum and opinion order the District Court found that when Rosemarie Leija and her classmate Lizette reported the molestation to their primary teacher, that teacher discounted the girls' story and took no action of any kind to address the matter. When Leija's parents later reported the harassment to the same teacher, she advised against stirring up trouble and convinced the parents nothing was happening.

Whether a school district can be charged with knowledge of a student's sexual harassment in a civil action because of its failure to comply with its obligations under Title IX and CFR § 106.8 to establish adequate complaint and grievance procedures is a question within our jurisdiction. On consideration of an interlocutory order certified for appeal by a district court pursuant to 28 USC §

1292(b), a court of appeals may exercise jurisdiction over any question that is included within the order containing the controlling question of law and is not tied to the particular question formulated by the District Court. *Yamaha v. Motor Corp. Calhoun* ---U.S.---, 116 S.Ct. 619 (1996). As the Court explained:

> [T]he appellate court may address any issue fairly included within the certified order because "it is the order that is appealable, and not the controlling question identified by the district court." 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 110.25[1], p. 300 (2d 3d 1995). *See also* 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure §, pp. 144-145 (1977) ("[T]he court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question."); Note, Interlocutory Appeals in the Federal Courts Under 28 USC § 1292(b), 88 Harv. L. Rev. 607, 628-629 (1975) ("scope of review [includes] all issues material to the order in question").

Id., 116 S.Ct. at 623.

By the same token, this court can exercise jurisdiction over the question of whether the male health and physical education teacher committed quid pro quo sexual harassment upon Rosemarie. This is an issue that is material to and fairly included within the certified order. The District Court recognized in its memorandum opinion and order that quid quo pro abuse is a type of sexual harassment actionable under Title VII in which the actions of the employer's agents or supervisory personnel are imputed to the employer whether or not the employer knew, should have known, or

approved of the actions. That court further concluded that Title IX cases are properly analyzed, in part, under these two types of discrimination.

Similarly, the OCR draft Guidance provides that quid pro quo harassment occurs when a school employee explicitly or implicitly conditions a student's participation in an education program or school activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. 61 Fed. Reg. at 52,172, citing *Alexander v. Yale Univ.*, 459 F.Supp. 1, 4 (D. Conn. 1977); *Kadiki v. Va. Commonwealth Univ.*, 892 F.Supp. 746, 752 (E.D.Va. 1995); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777-79 (2d Cir. 1994). A school will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment. *See Meritor Savings Bank v. Vinson*, 477 U.S. at 70-71; *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); EEOC Notice N-915-050, March 1990, Policy Guidance on Current Issues of Sexual Harassment, at 21; *Kadiki*, 892 F.Supp. at 752; 61 Fed. Reg. at 52,173.

The District Court found that Tony Perales taught Rosemarie Leija health and physical education in the second grade during the 1989-90 school year. During that year, Coach Perales sexually molested her while she was in his classroom. Most of the abuse occurred while he was showing movies to the class in a darkened classroom. He would instruct Rosemarie to come to the back of the room and sit on his lap. He would then place his hands beneath her undergarments and rub her chest, her buttocks, and between her legs. The plaintiffs' brief points to evidence in the record that Perales referred to Rosemarie as "Princess,"

although he did not have pet names for the other students. He singled out Rosemarie for special attention, allowing her to sit out physical education exercises and to do favors and special tasks for him, such as running errands. He also gave her candy and other gifts that he did not confer on the other students.

Consequently, a reasonable trier of fact could have found that Rosemarie was placed in a situation, as has occurred in many cases, in which the line between quid pro quo and hostile environment discrimination was blurred. See 61 Fed.Reg. at 52,173. At her young age Rosemarie reasonably could have believed that she had to tolerate sexual touching, manipulating and petting by Perales as the price he required for his gifts and special treatment of her, his continued favoritism and goodwill, her continued participation in his class and in the health film viewing, and her avoidance of embarrassment and humiliation that she might suffer had she challenged his advances. Consequently, if this court does not affirm the judgment of liability against the school district on the plaintiffs' hostile environment sexual discrimination claim, it should either do so on the grounds of the school district's liability for quid pro quo sexual harassment, or it should reserve the latter issue for consideration by the district court upon remand.

The District Court clearly erred in placing limits on damages recoverable under Title IX. In *Franklin* the Supreme Court held that plaintiffs may recover compensatory damages under Title IX. The cornerstone to the Court's analysis was that all appropriate remedies are presumed available unless Congress has expressly indicated otherwise. *Franklin*, 503 U.S. at 68. The Court noted that the amendments to Title IX subsequent to its decision in *Cannon* indicated that Congress did not intend to limit remedies available in a suit brought under Title IX. *Id.* at 72-73.

Based on the amendments to Title IX and other legislative enactments, the "traditional backdrop of a full panoply of rights," and the Court's prior decisions, the *Franklin* Court concluded that a private right of action under Title IX provides a full spectrum of remedies to a successful plaintiff. Id. *Accord Rodgers v. Magnet Cove Public Schools*, 34 F.3d 642 (8th Cir. 1994); *Waldrop v. Southern Co. Services, Inc.*, 24 F.3d 152 (11th Cir. 1994); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994).

For the foregoing reasons I respectfully dissent from the majority's decision to reverse the District Court's judgment in favor of the plaintiffs holding the school district liable for damages under Title IX and to remand the case for entry of judgment in favor of the school district. Instead, for the reasons assigned above, the district court's judgment on liability on the basis of hostile environment sexual discrimination should be affirmed and its judgment placing limits on damages recoverable under Title IX should be reversed. The case should be remanded to the district court for further proceedings in light of the reasons stated herein.

APPENDIX B

LEIJA v. CANUTILLO INDEPENDENT SCHOOL DIST.
Cite on 697 F.Supp. 947 (W.D.Tex. 1995)

Martha LEIJA and Jerry Leija, as Next Friends of Rosemarie Leija, a Minor,
v.
The CANUTILLO INDEPENDENT SCHOOL DISTRICT.
No. EP.-93-CA-487-F.

United States District Court,
W.D. Texas,
El Paso Division.
June 9, 1995.

Parents brought action against school district on behalf of their daughter, a student, alleging that student was sexually abused by teacher. After jury awarded $1.4 million to parents under Title IX, the District Court, Furgeson, J., held that: (1) in teacher-student sexual abuse cases under Title IX, acts of teachers are imputed to school district under strict liability principles, and (2) student could recover expenses for medical treatment, expenses for mental health treatment, and expenses for special education.

New trial on issue of damages.

1. Civil Rights 128

In teacher-student sexual abuse cases under Title IX, acts of teachers are imputed to school district under strict liability principles; under Title IX's prior standard, school

district could be liable for teacher's sexual abuse only when teacher was acting in scope of his or her authority, which is never the case, and lesser standards for school district's liability, such as a "knew or should have known" standard, would also be ineffective as remedy, since school districts rarely know about sexual abuse as it usually occurs secretly. Education amendments of 1972, §§ 901-909, as amended. 20 U.S.C.A. §§ 1681-1688.

2. Civil Rights 271

In Title IX cases against school district for sexual abuse of school children, child may recover (1) expenses for medical treatment, (2) expenses for mental health treatment, and (3) expenses for special education; limitation on damages balances need to compensate child for his or her injuries against need to limit potential liability of school districts which have scarce financial resources and essential public purpose. Education Amendments of 1972, §§ 901-909, as amended. 20 U.S.C.A. §§ 1681-1688.

3. Civil Rights 128

Title IX of Education Amendments of 1972 applied to student's action against teacher for sexual abuse, even though specific activity involved in suit did not receive federal funds; it was enough that educational institution received federal funds for liability to attach under Title IX. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

Mark Berry, Christie, Berry & Dunbar, Thomas E. Stanton, El Paso, TX, for plaintiff.

Henry C. Hosford, Baskind, Samaniego & Hoeford, El Paso, TX, for defendant.

MEMORANDUM OPINION AND ORDER

FURGESON, District Judge.

Introduction

Rosemarie Leija brought this case under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88. She claimed that, while she was a second grade student in the Canutillo Independent School District, her physical education teacher Tony Perales sexually abused her. At the end of the testimony, this court determined as a matter of law that Miss Leija proved the abuse occurred. The jury was then asked agency questions to determine whether the acts of Coach Perales were to be imputed to the School District, because only an educational institution can be liable under Title IX for acts of intentional discrimination based on sex. In light of the court's view of Title IX, which has evolved since the trial ended three months ago, the court believes that the agency questions were unnecessary. Instead, in cases such as this one, the court believes that the actions of a teacher should be strictly imputed to an educational institution. Concurrently, the court believes that limitations should be placed on damages.

Although other courts have declined to interpret Title IX as a strict liability statute, *see Howard v. Board of Educ. of Sycamore Community Unit School Dist.*, 876 F.Supp. 959, 974 (N.D.Ill. 1996), this court was finally convinced of the correctness of its approach after reflecting the jury's verdict awarding damages of $1,400,000 on the basis of the standard definitions of mental anguish, pain and suffering. The damages were excessive and unjustified, but not because the

jury was inflamed or beset by passion. On the contrary, the jury was conscientious and deliberate. The problem it faced was that it had no clear guidance from the court about how to measure damages, which is certainly needed in cases where little girls are sexually abused by their teachers. With proper instructions, which admittedly go beyond the present general ones, the court firmly believes that juries will do their duty and will render verdicts within proper limits in this category of cases under Title IX. This opinion will suggest those limits, with the ultimate hope that a remedy legislated by the Congress will not be lost because damages cannot be given some rational parameters.

Litigation under Title IX has been a continuing challenge for federal courts, to some extent because of the elegant brevity of the statute. For example, a private cause of action with a damage remedy is not stated in the statute but instead has been implied to exist through court interpretation. *See Franklin v. Gwinnett County pub. Sch.*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992); *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). Since the text of and legislative intent behind Title IX are silent on both the private rights and available remedies, it is "hardly surprising" that the usual sources for guidance on these questions "yield no explicit answer." *Franklin*, 503 U.S. at 76, 112 S.Ct. at 1038 (Scalia, J., concurring). Courts have thus been required to fill the gaps, and the results have *not* necessarily been uniform. *See, e.g.*, *Chance v. Rice Univ.*, 984 F.2d 151 (5th Cir. 1993); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987); *Floyd v. Waiters*, 881 F.Supp. 867 (M.D.Ga. 1993); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F.Supp. 1288 (N.D.Cal. 1993). In keeping with the

trend, this opinion takes yet another view of Title IX, especially by suggesting an analytical framework which divides Title IX cases into categories.

Facts

While in the second grade at Canutillo Elementary School in Canutillo, Texas, throughout the 1989-1990 school year, Rosemarie Leija was taught health and physical education by Tony Perales. During that year, Coach Perales sexually molested her while she was in his classroom. For the most part, the abuse occurred while he was showing movies to Miss Leija's class in a darkened classroom. Coach Perales would instruct her to come to the back of the room and sit on his lap. He would then place his hands beneath her undergarments and rub her chest, her buttocks, and between her legs. There was no testimony suggesting penetration. At the minimum, this happened eight times; at the maximum, twenty times. Testimony also indicated that Miss Leija was not the only target of the coach's attentions. He molested her classmate Lizette Soto as well.

Eventually, the two girls reported this matter to their primary teacher, Pam Mendoza, who discounted the girls' story and took no action of any kind to address the matter. She did not, for example, tell any other teacher or administrator about the matter. After the abuse continued, Miss Leija reported the matter to her parents in March 1990, and they then talked to Ms. Mendoza, who advised against stirring up trouble and convinced the parents that nothing was happening anyway. Miss Leija left the school in the third grade and encountered no further problems from Coach Perales.

Later, in the next school year, Coach Perales continued to abuse young girls in his class, to an even

greater degree. The parents of the girls initiated complaints to teachers and administrators, who adopted Ms. Mendoza's approach to the problem. Finally, around Christmas of 1990, when a complaint was filed with law enforcement officers against Coach Perales, the District's superintendent was notified and he relieved Coach Perales of his duties. Miss Leija eventually sued the Canutillo Independent School District and Coach Perales, under both Title IX and 18 U.S.C. § 1983. The court entered summary judgment for the defendant School District under section 1983, a default judgment against Coach Perales under section 1983, and a judgment of dismissal in favor of Coach Perales under Title IX because only educational institutions can be sued under the statute. As to suits against institutions only, *see*, *Doe v. Petaluma City Sch. Dist.*, 890 F.Supp. 1560, 1576-77 (N.D.Cal. 1993). The School District went to trial before a jury under Title IX.

The Trial

During trial, the court excluded from presentation to the jury evidence of Coach Perales' abuse against other girls, based in part on it prejudicial impact under Rule 403 of the Federal Rules of Evidence. The jury, however, heard the testimony of Coach Perales and Ms. Mendoza, which consisted mostly of their invocation of the Fifth Amendment. It also heard testimony from Miss Leija, her parents, some school personnel and psychological experts for both sides. Since the court found that Miss Leija proved the existence of sexual abuse as a matter of law, it instructed the jury that she had been the subject of intentional discrimination. The jury was then asked questions on agency to determine if the School District itself could be held liable under Title IX.

After quickly resolving the agency issues in favor of the plaintiff, the jury took over a day to consider damages. Early on, the jury sent a question to the court about

damages, based on the fact that, in final argument, plaintiff's counsel had requested relief for $7,000,000. The court's response, although traditional in wording, was clearly less than helpful. The question was:

> Judge, we feel a compensation should be awarded, but we feel that $7 million is too much. Some help in determining an amount would be helpful.

The answer was:

> You must determine the amount of damages you, the jury, believe is appropriate based on the instructions and the evidence. You are not bound in any way by the arguments of the lawyers as to what they might believe to be appropriate.

The referenced instructions to the jury were the traditional instructions given in federal cases where damages are properly sought for mental anguish.

After agonizing deliberation, the jury found that Miss Leija's past damages were $900,000 and future damages were $500,000. The jury did its best. It needed better instructions; it deserved better instructions. The court firmly believes, with better instructions, the jury would have reached a proper verdict. The next jury to hear the damage proof in this case will receive better instructions.

Title IX and Strict Liability

Plaintiff argued from the beginning of this case that the court should apply the principles of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000c-17, to Title IX analysis. In particular, plaintiff sought to incorporate the agency rules of Title VII into Title IX to impute the acts of

Coach Perales to the School District. Although there is some support outside the Fifth Circuit for the application of Title VII principles to Title IX. *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), the Fifth Circuit has held in clear language that Title IX is to be analyzed under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7, not under Title VII. *Chance v. Rice Univ.*, 984 F.2d 151 (5th Cir. 1993).

The Fifth Circuit decision in *Chance* does not, however, address the issue of imputed liability under Title IX. In the instant case, it must be addressed, because the plaintiff must establish some form of imputed liability or else lose her suit. The court has already granted summary judgment on Miss Leija's section 1983 claim because the School District's board had no knowledge of the abuse she suffered and therefore could not have been deliberately indifferent to her rights. The question thus becomes whether the intentional discrimination of Coach Perales against Miss Leija, unknown by the school board or administrators of the Canutillo Independent School District, can still be imputed to the District under Title IX.

As briefly stated earlier, the reason the case essentially boils down to the issue of imputed liability is that, at trial, discriminatory intent was shown. Not one witness refuted that the physical sexual abuse of the plaintiff occurred. Miss Leija testified to it. Her classmate testified to it. The School District was unable to rebut it. Coach Perales, the perpetrator, and Ms. Mendoza, plaintiff's teacher, invoked the Fifth Amendment when asked about the abuse. Although Coach Perales had been sued under Title IX, he was dismissed and therefore not a party at trial. The court allowed the jury to receive testimony from Coach Perales and Ms. Mendoza that included their invocation of the Fifth Amendment. To control to a reasonable, extent the

possible prejudice that can and does arise in such a context, the court required counsel for plaintiff to submit the questions calculated to draw a Fifth Amendment response before either of the witnesses took the stand. Counsel cooperated fully and the court screened the questions. The jury was then told that it could draw a negative inference from the invocation of the Fifth Amendment. *See F.D.I.C. v. Fidelity & Deposit Co. of Md.*, 45 F.3d 969 (5th Cir. 1996).

Based on these facts, the court took the matter from the jury's consideration and found that there was intentional discrimination in this case. "[W]hen a teacher sexually harasses and abuses a student," that teacher discriminates of the basis of sex. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75, 112 S.Ct. 1028, 1087, 117 L.Ed.2d 208 (1992). Therefore, the only question left for resolution was whether the teacher's intentional discrimination against Rosemarie Leija could be imputed to the Canutillo Independent School District.

The proper resolution of this issue has not been self-evident or necessarily obvious. Indeed, the issue of imputed liability is one that plagues courts in all of the broad mass of litigation that fits under the civil rights rubrie, including suits under Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972 and 42 U.S.C. § 1983. Even when the law regarded imputed liability or its absence is "well settled," such as in section 1983 suits, clear lines of distinction can sometimes be difficult to ascertain. When the statute itself provides for some imputed liability under agency principles, such as in Title VII suits, it can still be difficult to know where to draw the line. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Finally, when the statute is silent about the issue of imputed liability,

such as in Title VI and Title IX, even more difficulty comes into play. *Compare, e.g., Howard v. Board of Educ. of Sycamore Community Sch. Dist.*, 876 F.Supp. 959 (N.D.ILL. 1995); *Hastings v. Hancock*, 842 F.Supp. 959 1815 (D.Kan. 1993); *Floyd v. Waiters*, 831 F.Supp. 867 (M.D.Ga. 1993). From reading the cases, it is clear that this court is not the only federal court to engage in a jurisprudential struggle with imputed liability issues under all these statutes. We have each utilized various traditional analytical methods in coming to terms with the statute. This court's way is to establish categories of analysis for assistance in focusing the issue.

A. *Analysis of Title IX Cases Based on Categories.*

There is precedent for analyzing statutorily-created causes of action by types or categories. One example is *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), where the Supreme Court notes that two types of sexual harassment are actionable under Title VII; (1) where employment benefits are granted in return for sexual favors (now called *quid pro quo* cases) and (2) where improper acts create a hostile working environment (now called a hostile environment cases). This differentiation is important for several reasons, and one relates to issues of agency. Under the *quid pro-quo* category of cases, the actions of the employer's agents or supervisory personnel are to be imputed to the employer, "whether or not the employer knew, should have known, or approved of the supervisor's actions." 477 U.S. at 71, 106 S.Ct. at 2407. On the other hand, under the hostile-environment category of cases, the actions of the employer's agents are not be imputed unless the employer knows of the harassment. *Id.* Just as analysis by category now makes a difference in Title VII cases because of *Meritor*, it should likewise make a difference in

Title IX cases. In light of this view, it is the court's opinion that Title IX cases are properly analyzed under two categories; (1) relationships and (2) type of discrimination.

Intentional sexual discrimination under Title IS can arise in the following relationships: (1) the school and an employee, (2) the school and a student, and (3) one student and another student. As to the third relationship, see *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560 (N.D.Cal. 1993). There can be several types of school discrimination: (1) denial of access to the school or the school's programs, normally but not always at the higher education level, (2) physical sexual abuse, or (3) non-physical but sexist harassment. These two categories (relationship and type of discrimination) probably do not exhaust the field, but the court draws the distinctions because of the belief that each distinction requires a separate analysis. For example, a case of discrimination brought by a teacher against a school district is different from a case of abuse brought by a student against a school district, and a case of access to a school or program is different from a case of sexual abuse. Although such distinctions may not uniformity across the broad spectrum of Title IX litigation, some uniform analysis may be appropriate as to some combined categories, such as explicit sexual abuse of a student at the elementary and secondary and perhaps college levels. *See* comments in *Doe v. Taylor Indep. Sck. Dist.*, 15 F.3d 443, 467 n. 5 (5th Cir. 1994) (en banc) (Garwood, J., dissenting in part) (addressing a claim under 42 U.S.C. § 1993).

B. *One of the Core Categories of Title IX Cases.*

Without question, one of the core objectives of Title IX is to provide relief to young girls sexually abused by their male teachers at schools receiving federal funds. This

category of cases will be referred to as "teacher-student sexual abuse" cases. It is true, of course, that there can be varying degrees of sexual abuse, from the very intrusive to the intrusive, but all degrees are objectionable.

No opinion polls are necessary to get a fix on this question. The American public has zero tolerance for sexual abuse of little girls, whether by teachers or others; their Congress has zero tolerance as well; hence, Title IX reaches this conduct with the full weight of its purpose. This being said, it should also be said that neither the American public nor their Congress nor Title IX promotes witch hunts of any kind. Allegations of teacher-child abuse should be carefully stated and carefully scrutinized; nonetheless, the unfortunate fact is that little girls (and little boys) are sometimes sexually abused by their teachers. When they are, Title IX provides an effective remedy to address the problem. As to the existence of abuse in the schools, *see* Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 Emory L. J. 271, 176-78 (1994).

It was not until the Supreme Court decision in *Franklin* in 1992 that lawyers, litigants and judges grasped the full availability of Title IX remedies. *See also Pfeiffer v. Marion Ctr. Area Sch. Dist. Bd. of Sch. Directors for the Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3rd Cir. 1990). Before *Franklin*, cases of this nature were generally filed under 42 U.S.C. § 1983. Since the principle of respondeat superior does not apply under section 1983 to suits against governmental entities, like school districts, relief was seldom granted in such suits, even when some relief seemed justified. *See Doe v. Taylor Independent Sch. Dist.*, 15 F.3d 448 (5th Cir. 1994) (en banc). In a thorough casenote written about the initial decision in *Taylor Independent School District*, the difficult history of section 1983 litigation in student abuse cases is chronicled. Barbara L. Horwitz,

Note, *The Duty of Schools to Protect Students from Sexual Harassment; How Much Recovery Will the Law Allow*, 62 U. Cin.L. Rev. 1165 (1994). The writer observes:

> The argument generally accepted by the courts, allowing recovery where the plaintiff shows a pattern of deliberate indifference through policy or custom, has not worked well in providing a means of relief to those whose rights were seriously violated and has certainly not helped to quell the incident of abuse.

Id. at 1222.

In the wake of *Franklin*, future school sexual abuse cases will more likely be litigated under Title IX than under section 1983. While the two statutes have some similarities, their differences are pronounced. The single fact that they were written in different centuries almost 100 years apart accentuates the differences. Section 1983 is a statute that opens a narrow and limited window for recovery in cases where governmental entities or actors are involved in constitutional deprivations. Passed under the spending power of Congress, Title IX deals with intentional torts relating to discrimination on the basis of sex. As different enactments, there should therefore be no presumption that the statutes should have the same attributes. In other words, there should be no requirement that the limitations of section 1983 should be transferred to Title IX. In the court's opinion, they should not. Otherwise, Title IX actions are transformed into section 1983 actions, to the extent the statutes cover the same substantive issues. Certainly, the Congress did not intend to enact Title IX to duplicate section 1981. Such redundancy should not be attributed to the institution created by the first article of the Constitution.

At least one judge on the Fifth Circuit suggests that section 1983 limitations do not apply to Title IX. In her dissent in *Taylor Independent School District*, Judge Jones writes as follows:

> Not only is there no broad constitutional purpose to be served by recognizing for Doe's [the claimant-student] benefit a constitutional right not to have her bodily integrity compromised by a teacher's sexual abuse, but the constitutional remedy that the majority strives to assure her is merely redundant of well-established criminal, tort and statutory sanctions. Coach Stroud [the offending teacher] went to jail for committing statutory rape. Doe [the claimant-student] has state-law tort claims available against [him] for assault and battery and intentional infliction of emotional distress. Most significant, perhaps, if her personal Title IX claim against the school district, which, in exchange for use of federal funds, rendered itself potentially liable for this type of sex harassment case. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Doe in fact had a Title IX claim pending in state court when this case was orally argued *en banc*.

16 F.3d at 477. Judge Jones' reference to Title IX as a remedy for a sexually abused student is important to this court in light of other observations she makes in her opinion. For one thing, she notes that the coach's conduct in *Taylor Independent School District* cannot be seen by any stretch of the imagination to have been in the scope of his "pedagogical authority." *Id.* at 476. This comment points to a central problem of using agency principles in Title IX cases. No teacher who sexually abuses a student acts in the scope of his authority. No school district anywhere, with or without clearly stated policies on the subject, could ever be found to

condone, much less authorize, the sexual abuse of a child as part of its teachers' duties.

[I] The problem in teacher-student sexual abuse cases is therefore as follows:

(1) only the school district can be liable under Title IX;

(2) only intentional acts of discrimination are reached by Title IX;

(3) the intentional acts can be committed only by the district's employees who will never have authorization to act; so

(4) unless the acts of the employees of the district are fully and strictly imputed to the district, Title IX becomes potentially inoperative.

In teacher-student sexual abuse cases, intentional discrimination can occur only through the intentional acts of a school district's employees. These acts of the employees must accordingly be imputed to the district in a meaningful way, so that the intent of Congress to provide a remedy for intentional discrimination is not thwarted. To be certain that it is not, this court thus believes that acts of employees should be imputed to the school district under strict liability principles. *See* Ronna Greff Schneide, *Sexual Harassment and Higher Education*, 65 Tex.L.Rev. 525, 569-71 (1987) [hereinafter Schneider, *Sexual Harassment and Higher Education*]. In fact, this seems to be the import of Justice White's majority opinion in *Franklin*, where he writes that the availability of damage relief in Title IX cases "will require state entities to pay monetary awards out of their treasuries for intentional violation of federal statutes." *Franklin*, 503 U.S. at 75, 112 S.Ct. at 1037.

There are other alternatives, of course. A "knew or should have known" standard can be utilized, but the very nature of sexually abusive conduct is that it occurs or at least is attempted under cover of secrecy. A school district or its officials will hardly every "know" of the conduct and will not likely be in a position to "should have known." Further, "the standard for the knowledge that [a school] official 'should have' may vary." Kimberly A. Mango, Comment, *Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 Conn.L.Rev. 355, 395 (1991) [hereinafter Mango, *Students Versus Professors*]. Also, since a "knew or should have known" approach can result in administrators and others closing their eyes to the problem, it is not an effective way to address the problem. Moreover, the Supreme Court has already rejected this standard in *quid pro quo* cases under Title VII in the *Meritor* decision. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 70-71, 106 S.Ct 2399, 2407, 91 L.Ed.2d 49 (1986).

Section 219(2) of the Restatement of Agency can also be utilized, because it does provide circumstances where a master is liable for the torts of his servant even when the servant acts outside the scope of his authority. Although more promising, this approach does, in the end, have limits because of the nature of suits like these. For example, under Section 219(2)(b), liability can be imputed if a school district "was negligent or reckless." However, even if a district has no policy on the subject, can a district ever be negligent or reckless in the fact of the fact of abuse, since again it usually happens behind closed doors in secret? In this case, for example, it is not altogether clear that the School District was negligent or reckless. One of its teachers failed to make a report, but is that conduct imputed to the District? Where does the line get drawn: at the teacher, at the principal, at the superintendent, or at the Board? *See Hastings v.*

Hancock, 842 F.Supp. 1315, 1318-19 (D.Kan.1993); Mango, *Students Versus Professors*, at 394-96.

Although it is obvious this kind of inappropriate conduct should never happen and would never be condoned by a school system, it unfortunately does happen. Judge Jones examines this exact point in her dissent:

> There is no systemic abuse of institutional power exemplified in this case, because no state agency, school, school superintendent or principal would ever condone what happened to Doe. Similarly, only by *ipse dixit* does the majority support its belief that Stroud's conduct was an abuse of state power. He was committing a crime just as surely as if he had stolen Doe's watch. Ordinarily, a state actor may point to some state policy in support of his actions. A court's job is to say how that proffered policy stacks up against constitutional protections. Here, there is no policy to be tested. The motive for Stroud's conduct was crass self-gratification. The Constitution has little to say about state actors who commit ordinary crimes for their own benefit. *Compare Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. §194, 82 L.Ed.2d 393 (1984). That task is better left to statutory and common law. 'It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.' *Daniels*, 474 U.S. at 338, 106 S.Ct. at 666.

15 F.3d at 477. After making this observation, Judge Jones then points meaningfully to the fact that, although the student in *Taylor Independent School District* did not state a section 1983 claim, even against school supervisory personnel, she still had a claim because she sued under Title IX in state court. *Id.*

Of course, this court does not want to read Judge Jones' dissent too broadly or in an unfair way. Still, while noting the limits of section 1983 cited above, she suggests that these limits do not exist under Title IX. In this court's opinion, they do not exist because, at least in regard to teacher-student sexual abuse cases, Title IX should be held to impute the intentional discrimination of a teacher to a school district under strict liability principles. Although this approach in Title VII cases was ultimately rejected by the Supreme Court in the *Meritor* decision, 477 U.S. at 72, 106 S.Ct. at 2408, there are real differences in language and scope between the two statutes that lead this court to believe that the reasoning in *Meritor* in this regard does not apply. The very fact that Title IX deals with children in the classroom instead of adults in the workplace is perhaps the most compelling reason for a different analysis. *See* Joanne Liebman Matson, Note, *Civil Rights-Sex Discrimination in Education-Compensatory Damages Available in a Title IX Sexual Discrimination Claim. Franklin v. Gwinnett County Pub. Sch.* 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), 15 U.ARK. LITTLE ROCK L.J. (1993). Moreover, this rule of strict liability is not being implemented across all the categories of Title IX cases; it applies only to children suffering sexual abuse at the hands of their teachers. The standards applicable to other categories must be determined as those fact situations arise.

Defendant School District argues against this approach with vigor. In the first place, it asserts that teacher abuse of children is difficult to detect. With or without regulations and policies on the subject, teachers know abuse is wrong and thus do the acts in secret, as noted earlier. Young children, taught to respect their teachers and follow their teachers' request, often do not know what to do when abuse occurs, no matter how many group counseling sessions a school might conduct on the subject. To place strict liability

on a district therefore creates liability, according to the argument, even when a school district has done everything in its power to avoid the problem.

Beyond the matters outlined earlier, there are other, countervailing policy considerations that answer this argument. For example, the risk of harm is better placed on a school district than on a young student. To do so heightens the vigilance of the district and causes employees at all levels of the system to be alert to the problem. *See* Schneider, *Sexual Harassment and Higher Education*, at 567-68. The young student, vulnerable in every way, should not be the only effective line of defense or the policing authority. The job of the student, especially the elementary student, is to learn in a trusting environment. As much as possible should be done to achieve this goal and to eliminate any interference with this goal. Given that the overwhelming majority of teachers are above reproach in this area, the problem for school districts should not be institutionally threatening as far as the number of potentially abusive activities is concerned.

Even if the number of incidents may be limited, the School District also argues that strict liability will still be ruinous for districts because they are strapped for funds and simply cannot respond to massive awards in these suits. The $1.4 million verdict in this case is an example of this concern. While it is acknowledged that Canutilla Independent School District if a financially poor school district, even rich districts would be strapped by a verdict of $1.4 million. Certainly, the Congress did not intend for Title IX suits to bankrupt school districts. *See Howard v. Board of Educ. of Sycamore Community Unit Sch. Dist.*, 876 F.Supp. 959, 974 (N.D.ILL. 1996). Everyone but a random plaintiff loses in such situations. Just as child abuse should not occur, school districts should not be subjected to potential insolvency when it does occur. For that reason, as

set forth below, it is the opinion of the court that damages should be limited in teacher-student sexual abuse cases under Title IX.

Title IX and Limited Damages

As noted earlier, in the *Franklin* decision, the Supreme Court held that Title IX claimants were entitled to recover damages. In doing so, the Court reaffirmed a principle with "deep roots" in American jurisprudence: "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 503 U.S. at 68, 112 S.Ct. at 1033. In *Franklin*, the Court cited *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), where issues of damages were considered and where "multiple opinions" suggested "the difficulty of inferring the common ground among Justices ...." 503 U.S. at 70, 112 S.Ct. at 1035. Still, in *Guardians Ass'n*, "a clear majority [of the Court] expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action." *Id.*

It is also no less true that, in *Guardians Ass'n*, the Supreme Court observed that "make whole" remedies "are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its power under the Spending Clause to place conditions on the grant of federal funds.'" 463 U.S. at 596, 103 S.Ct. at 3229. Moreover, as Justice White writes in his majority opinion in *Franklin* some damage remedies, such as back pay, are not appropriate in suits by students under Title IX since students are not being paid by the schools in the first place. 503 U.S. at 75-76, 112 S.Ct. at 1038. Thus, the emphasis must be on

the word "appropriate" when considering "any appropriate relief." Correspondingly, "make whole" remedies are not necessarily, the norm when "spending statutes" are involved.

Concurring with Justice White's majority opinion in *Franklin*, Justice Scalia, joined by two other Justices, expresses this concern:

> what the Court's analytical constrict comes down to is this: Unless Congress expressly legislates a more limited remedial policy with respect to rights of action it does not know it is creating, it intends the full gamut of remedies to be applied.

Id. at 77, 112 S.Ct. at 1039. Justice Scalia continues, suggesting the very approach implemented in this case: "when rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well." *Id.*

This court agrees. In teacher-student sexual abuse cases under Title IX, appropriate remedies should have "appropriate limitations." The reason is clear. Public education is of critical importance to our Nation. Limited damages under Title IX protect the schools and simultaneously provide relief to sexually abused students. Under such circumstances, the majority and concurring opinions in *Franklin* are closer in philosophy than a first reading might suggest. In cases where rights are implied, "appropriate" remedies will also be implied. Those remedies, to be appropriate, may in certain categories of cases be limited.

[2] In regard to Title IX cases involving sexual abuse of school children, the remedy this court deems most appropriate is a limited one that covers (1) the expenses for

medical treatment, (2) the expenses for mental health treatment, and (3) the expenses for special education. These three elements of damage are designed to award money to pay for services that are best able to heal the child physically, emotionally and intellectually. The goal is to put money into direct service that focus on the child. The problem is complicated and the proof will often be difficult, because different children respond to abuse in very different ways. Some suffer extensive harm; some do not. *See* Eugene E. Levitt & Cornelia Maré Pinnell, *Some Additional Light on the Childhood Sexual Abuse-Psychopathology Axis*, 43 INT'L J. of CLINICAL AND EXPERIMENTAL HYPNOSIS 145 (April 1995). The harm is also not limited to emotional issues; it can involve physical issues as well. Tori DeAngelis, *New Threat Associated With Child Abuse*, AMER.PSYCHOLOGICAL ASS'N MONITOR, April 1995, at 1. The child may also have special educational needs that can best be handled in a private school setting that is adapted for students who need special attention. The three elements of damage have short term and potentially long term consequences, but again all are designed to maximize the healing of the child so that the child can realize his or her full potential, in relationships and eventually at work.

Damages of this nature are specific and, to a real extent, limited. Although long term treatment may be required, it still should not cost so much as to impair the ability of a school district to meet the needs of all of its other students. The abused child will be provided for, but not to the detriment of that child's classmates, who do not suffer under the trauma of abuse but nonetheless deserve to have their own educational needs met.

The goal here is that school districts should not be placed in an impossible position under Title IX. This is an era of dwindling public resources. Federal funds are

critically important to public schools. These funds must not be rejected because they carry with them the potential of a disastrous damage award, no matter how remote the potential is. Children who are abused deserve a fair opportunity to a full range of treatment, but they are not entitled to "make whole" relief, given the need to protect the schools and their critical mission in our society.

This balancing approach has other, obvious virtues to recommend it. In addition to protecting the schools and aiding the abused child, it should facilitate settlement, which is an important societal and judicial objective. A school will receive a claim and evaluate it. If the claim has no merit, the school will defend against the claim. If the claim has merit or potential merit, the school will investigate the treatment needs of the child and then will discuss settlement within reasonable parameters. The child's family will have the same parameters to analyze and evaluate. No windfalls are possible. Negotiations will center on three specific areas of recovery.

Moreover, by focusing on the treatment needs of the child, the parties can reduce some of the conflict and delay which often arises in litigation. The best interest of the child will be evaluated early. Even if the merit of the claim is unclear, the parties can still agree to help the child without the specter of a windfall verdict hanging over the collective heads of the school district policymakers.

In light of this court's decision, the damage award by the jury in this case cannot stand. The School District has requested a remittitur, but a remittitur is not appropriate here because there was no proof of how much treatment and assistance Miss Leija needed or will need or what the cost of such treatment and assistance was or will be. Under the circumstances, the court has no choice but to treat the

Motion for Remittitur as a motion for new trial on the issue of damages and then grant a new trial. At a new trial on damages, proof can be presented to t new jury on expenses (1) for medical treatment, (2) for mental health treatment and (3) for special education. At the same time, the court can consider the award of legal fees, because the Civil Rights Attorney's Fees Awards, Act of 1976, 42 U.S.C. §1988, authorizes such an award to the prevailing parties under Title IX. It is important to mention the availability of fees to emphasize that limited relief for treatment for the abused student will not be reduced by legal costs.

Grove City College Issue and Remaining Issues

[3] On one of its arguments for judgment, the School District asserts that, because the specific activity involved in this suit did not receive federal funds, Title IX does not apply. Although the Supreme Court agreed with this argument in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), Congress reversed the interpretation in the Civil Rights Restoration Act of 1987 and said that it is enough that the educational institution, rather than a specific activity of the institution, receives federal funds for liability to attach under Title IX. Therefore, the School District's argument is foreclosed.

In light of this decision, all other pending motions by both Miss Leija and the School District are either overruled or mooted. Subsequent orders will set the case for a jury trial on the issue of damages.

Conclusion

Although the approach of this court is this case may be unique in the way the concepts are combined, there is

nothing new in the individual parts. In her excellent article in Texas Law Review, written before the *Franklin* decision, Professor Schneider writes:

> Thus, there may be some drawbacks to imposing institutional liability in the absence of knowledge of sexual harassment. A compromise position would impose strict liability upon the institution, but would reduce accordingly any monetary award if the institution took action immediately upon discovering the harassment.

Schneider, *Sexual Harassment and Higher Education* at 570. Even though the court does not adopt all of Professor Schneider's recommendations, it does accept her basic approach to liability and damages under Title IX. In addition, the concept of categories of cases used in this opinion is grounded in Chief Justice Rehnquist's analysis in the *Meritor* decision. Justice Marshall's concurrence in *Meritor* forms the basis for the imposition of strict liability. The implied limitation on damages comes straight from Justice Scalia's concurring opinion in *Franklin*.

Under the circumstances, this opinion simply represents an amalgamation of existing pieces of analyses in the general area of federal statutes dealing with discrimination. Moreover, it does not cover the breadth of Title IX cases; instead, it cover only one category of Title IX cases, albeit a very important, core category. Finally, the goal of the opinion is to implement a Congressional statute in a balanced way, with three objectives in mind; to discourage sexual discrimination of students, to heal students who are sexually abused and to protect schools from ruinous judgments. Will it work? The new jury trial in this case on damages will be an early test.

APPENDIX C

UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV 27 1996
CHARLES R. FULBRUGE III
CLERK

No. 95-50791

D.C. DOCKET NO. EP-93-CV-478(F)

MARTHA LEIJA, as next friend of
Rosemarie Leija, a minor;
JERRY LEIJA, as next friend of
Rosemarie Leija, a minor
Plaintiffs - Appellees

v.

THE CANUTILLO INDEPENDENT SCHOOL DISTRICT
Defendant - Appellant

FILED
JAN 21 1997
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY /s/
DEPUTY CLERK

Appeal from the United States District Court
for the Western District of Texas, El Paso.

Before GARWOOD, BARKSDALE, and DENNIS, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ISSUED AS MANDATE: JAN 16 1997

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/
Deputy

New Orleans, Louisiana JAN 16 1997

APPENDIX D

U.S. COURT OF APPEALS
FILED
JAN 8 1997
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50791

MARTHA LEIJA, as next friend of
Rosemarie Leija, a minor;
JERRY LEIJA, as next friend of
Rosemarie Leija, a minor
Plaintiffs - Appellees

v.

THE CANUTILLO INDEPENDENT SCHOOL DISTRICT
Defendant - Appellant

- - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Western District of Texas, El Paso

- - - - - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion November 27, 1996, 5 Cir., F.3d)

Before GARWOOD, BARKSDALE and DENNIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-4

**CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.**

Judge DeMoss did not participate in the consideration of the suggestion for rehearing en banc.

RECEIVED
JAN 10 1997

APPENDIX E

20 U.S.C. § 1681. SEX

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . or

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARTHA LEIJA and JERRY LEIJA, as next friends of ROSEMARIE LEIJA, a minor,	§	
	§	EP-93-CA-478-F
v.	§	
THE CANUTILLO INDEPENDENT SCHOOL DISTRICT.	§	

COURT'S INSTRUCTION TO THE JURY

MEMBER OF THE JURY:

YOU HAVE HEARD THE EVIDENCE IN THIS CASE. I WILL NOW INSTRUCT YOU ON THE LAW THAT YOU MUST APPLY. IT IS YOUR DUTY TO FOLLOW THE LAW AS I GIVE IT TO YOU. ON THE OTHER HAND, YOU THE JURY ARE THE JUDGES OF THE FACTS. DO NOT CONSIDER ANY STATEMENT THAT I HAVE MADE IN THE COURSE OF TRIAL OR MAKE IN THESE INSTRUCTIONS AS AN INDICATION THAT I HAVE ANY OPINION ABOUT THE FACTS OF THIS CASE.

AFTER I INSTRUCT YOU ON THE LAW, THE ATTORNEYS WILL HAVE AN OPPORTUNITY TO MAKE THEIR CLOSING ARGUMENTS. STATEMENTS AND ARGUMENTS OF THE ATTORNEYS ARE NOT

EVIDENCE AND ARE NOT INSTRUCTIONS ON THE LAW. THEY ARE INTENDED ONLY TO ASSIST THE JURY IN UNDERSTANDING THE EVIDENCE AND THE PARTIES' CONTENTIONS.

ANSWER EACH QUESTION FROM THE FACTS AS YOU FIND THEM. DO NOT DECIDE WHO YOU THINK SHOULD WIN AND THEN ANSWER THE QUESTIONS ACCORDINGLY. YOUR ANSWERS AND YOUR VERDICT MUST BE UNANIMOUS.

BURDEN OF PROOF

IN THIS CASE, THE PLAINTIFF ROSEMARIE LEIJA MUST PROVE EVERY ESSENTIAL PART OF HER CLAIM BY A PREPONDERANCE OF THE EVIDENCE.

A PREPONDERANCE OF THE EVIDENCE SIMPLY MEANS EVIDENCE THAT PERSUADES YOU THAT THE PLAINTIFF'S CLAIM IS MORE LIKELY TRUE THAN NOT TRUE.

IN DECIDING WHETHER ANY FACT HAS BEEN PROVEN BY A PREPONDERANCE OF THE EVIDENCE, YOU MAY, UNLESS OTHERWISE INSTRUCTED, CONSIDER THE TESTIMONY OF ALL WITNESSES, REGARDLESS OF WHO MAY HAVE CALLED THEM, AND ALL EXHIBITS RECEIVED IN EVIDENCE, REGARDLESS OF WHO MAY HAVE PRODUCED THEM.

IF THE PROOF FAILS TO ESTABLISH ANY ESSENTIAL PART OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANT BY A PREPONDERANCE OF THE EVIDENCE, YOU SHOULD FIND FOR THE

DEFENDANT CANUTILLO INDEPENDENT SCHOOL DISTRICT ("CANUTILLO I.S.D.").

CREDIBILITY OF THE WITNESSES

AS THE SOLE JUDGES OF THE FACTS, YOU MUST DETERMINE WHICH OF THE WITNESSES YOU BELIEVE, WHAT PORTION OF THEIR TESTIMONY YOU ACCEPT AND WHAT WEIGHT YOU ATTACH TO IT. YOU ARE THE JUDGES OF THE CREDIBILITY OF THE WITNESSES.

THE LAW DOES NOT, HOWEVER, REQUIRE YOU TO ACCEPT ALL OF THE EVIDENCE I ADMITTED, EVEN THOUGH IT IS LEGALLY COMPETENT EVIDENCE. IN DETERMINING WHAT EVIDENCE YOU WILL ACCEPT, YOU MUST MAKE YOUR OWN EVALUATION OF THE TESTIMONY GIVEN BY EACH OF THE WITNESSES, AND DETERMINE THE DEGREE OF WEIGHT YOU CHOOSE TO GIVE TO HIS OR HER TESTIMONY. THE SAME TESTS THAT YOU USE IN YOUR EVERYDAY DEALINGS ARE THE TESTS WHICH YOU APPLY IN YOUR DELIBERATIONS: THE INTEREST OR LACK OF INTEREST OF ANY WITNESS IN THE OUTCOME OF THIS CASE; THE BIAS OR PREJUDICE OF A WITNESS, IF THERE BE ANY; THE AGE, THE APPEARANCE, AND THE MANNER IN WHICH THE WITNESS GIVES HIS OR HER TESTIMONY ON THE STAND; THE OPPORTUNITY THAT THE WITNESS HAD TO OBSERVE THE FACTS CONCERNING WHICH HE OR SHE TESTIFIES; AND THE PROBABILITY OR IMPROBABILITY OF THE WITNESS' TESTIMONY WHEN VIEWED IN THE LIGHT OF ALL OF THE OTHER EVIDENCE IN THE CASE. ALL ARE ITEMS TO BE TAKEN INTO YOUR CONSIDERATION IN

DETERMINING THE WEIGHT, IF ANY, YOU WILL ASSIGN TO THAT WITNESS' TESTIMONY.

A WITNESS MAY BE DISCREDITED OR IMPEACHED BY CONTRADICTORY EVIDENCE; OR BY EVIDENCE THAT AT SOME OTHER TIME THE WITNESS HAS SAID OR DONE SOMETHING, OR HAS FAILED TO SAY OR DO SOMETHING, WHICH IS INCONSISTENT WITH THE WITNESS' PRESENT TESTIMONY.

YOU SHOULD KEEP IN MIND, OF COURSE, THAT A SIMPLE MISTAKE BY A WITNESS DOES NOT NECESSARILY MEAN THAT THE WITNESS WAS NOT TELLING THE TRUTH AS HE OR SHE REMEMBERS IT, BECAUSE PEOPLE MAY FORGET SOME THINGS OR REMEMBER OTHER THINGS INACCURATELY. SO, IF A WITNESS HAS MADE A MISSTATEMENT, YOU NEED TO CONSIDER WHETHER THAT MISSTATEMENT WAS AN INTENTIONAL FALSEHOOD OR SIMPLY AN INNOCENT LAPSE OF MEMORY; AND THE SIGNIFICANCE OF THAT MAY DEPEND ON WHETHER IT HAS TO DO WITH AN IMPORTANT FACT OR WITH ONLY AN UNIMPORTANT DETAIL.

HOWEVER, THE TESTIMONY OF A SINGLE WITNESS MAY BE SUFFICIENT TO PROVE ANY FACT, EVEN IF A GREATER NUMBER OF WITNESSES MAY HAVE TESTIFIED TO THE CONTRARY, IF AFTER CONSIDERING ALL THE OTHER EVIDENCE YOU BELIEVE THAT SINGLE WITNESS.

THE REFUSAL OF WITNESS TO ANSWER

THE LAW REQUIRES THAT EVERY WITNESS ANSWER ALL PROPER QUESTIONS PUT TO HIM OR HER AT TRIAL, UNLESS THE COURT RULES HE OR SHE IS PRIVILEGED TO REFUSE TO ANSWER ON CONSTITUTIONAL OR OTHER GROUNDS. IN THIS TRIAL, THE COURT RULED THAT PAM MENDOZA AND TONY PERALES COULD INVOKE THEIR FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION. HOWEVER, SILENCE IN THE FACE OF AN ACCUSATION IS RELEVANT EVIDENCE. THEREFORE, YOU ARE INSTRUCTED THAT PAM MENDOZA'S REFUSAL TO ANSWER BASED UPON HER FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION MAY BE CONSIDERED BY YOU AS EVIDENCE TO ESTABLISH AN ADVERSE INFERENCE AGAINST HER TESTIMONY. YOU ARE ALSO INSTRUCTED THAT TONY PERALES' REFUSAL TO ANSWER BASED UPON HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION MAY BE CONSIDERED BY YOU AS EVIDENCE TO ESTABLISH AN ADVERSE INFERENCE AGAINST HIS TESTIMONY.

CONSIDERATION OF THE EVIDENCE

WHILE YOU SHOULD CONSIDER ONLY THE EVIDENCE IN THIS CASE, YOU ARE PERMITTED TO DRAW SUCH REASONABLE INFERENCES FROM THE TESTIMONY AND EXHIBITS AS YOU FEEL ARE JUSTIFIED IN THE LIGHT OF COMMON EXPERIENCE. IN OTHER WORDS, YOU MAY MAKE DEDUCTIONS AND REACH CONCLUSIONS THAT REASON AND COMMON SENSE LEAD YOU TO DRAW FROM THE FACTS THAT HAVE BEEN ESTABLISHED BY THE TESTIMONY AND EVIDENCE IN THE CASE.

THE TESTIMONY OF A SINGLE WITNESS MAY BE SUFFICIENT TO PROVE ANY FACT, EVEN IF A GREATER NUMBER OF WITNESSES MAY HAVE TESTIFIED TO THE CONTRARY, IF AFTER CONSIDERING ALL THE OTHER EVIDENCE YOU BELIEVE THAT SINGLE WITNESS.

THERE ARE TWO TYPES OF EVIDENCE THAT YOU MAY CONSIDER IN PROPERLY FINDING THE TRUTH AS TO THE FACTS IN THE CASE. ONE IS DIRECT EVIDENCE - SUCH AS TESTIMONY OF AN EYEWITNESS. THE OTHER IS INDIRECT OR CIRCUMSTANTIAL EVIDENCE - THE PROOF OF A CHAIN OF CIRCUMSTANCES THAT INDICATES THE EXISTENCE OR NONEXISTENCE OF CERTAIN OTHER FACTS. AS A GENERAL RULE, THE LAW MAKES NO DISTINCTION BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE, BUT SIMPLY REQUIRES THAT YOU FIND THE FACTS FROM A PREPONDERANCE OF ALL THE EVIDENCE, BOTH DIRECT AND CIRCUMSTANTIAL.

EXPERT WITNESSES

WHEN KNOWLEDGE OF TECHNICAL SUBJECT MATTER MAY BE HELPFUL TO THE JURY, A PERSON WHO HAS SPECIAL TRAINING OR EXPERIENCE IN THAT FIELD - HE IS CALLED AN EXPERT WITNESS - IS PERMITTED TO STATE HIS OPINION ON THOSE TECHNICAL MATTERS. HOWEVER, YOU ARE NOT REQUIRED TO ACCEPT THAT OPINION. AS WITH ANY OTHER WITNESS, IT IS UP TO YOU TO DECIDE WHETHER TO RELY UPON IT.

IN DECIDING WHETHER TO ACCEPT OR RELY UPON THE OPINION OF AN EXPERT WITNESS, YOU MAY CONSIDER ANY BIAS OF THE WITNESS, INCLUDING ANY BIAS YOU MAY INFER FROM EVIDENCE THAT THE EXPERT WITNESS HAS BEEN OR WILL BE PAID FOR REVIEWING THE CASE AND TESTIFYING, OR FROM EVIDENCE THAT HE TESTIFIES REGULARLY AS AN EXPERT WITNESS AND HIS INCOME FROM SUCH TESTIMONY REPRESENTS A SIGNIFICANT PORTION OF HIS INCOME.

THERE ARE TIMES WHEN AN EXPERT'S TESTIMONY IN A CASE IS SO NARROW IN SCOPE THAT THE TESTIMONY IS NOT PARTICULARLY HELPFUL TO THE JURY. IN THIS INSTANCE, FOR EXAMPLE, DR. JULIAN'S TESTIMONY WAS LIMITED IN SCOPE. WHETHER THE LIMITATION ON DR. JULIAN'S TESTIMONY WAS SO NARROW IN SCOPE AS TO RENDER HER TESTIMONY UNHELPFUL IS FOR YOUR DETERMINATION.

DEPOSITION TESTIMONY

CERTAIN TESTIMONY WAS PRESENTED TO YOU THROUGH A DEPOSITION. A DEPOSITION IS THE SWORN, RECORDED ANSWERS TO QUESTIONS ASKED A WITNESS IN ADVANCE OF THE TRIAL. A COURT REPORTER WAS PRESENT AND RECORDED THE TESTIMONY. THIS DEPOSITION TESTIMONY IS ENTITLED TO THE SAME CONSIDERATION AS IF THE WITNESS HAD BEEN PRESENT AND HAD TESTIFIED FROM THE WITNESS STAND IN COURT.

JUROR'S NOTES

ANY NOTES THAT YOU HAVE TAKEN DURING THIS TRIAL ARE ONLY AIDS TO MEMORY. IF YOUR MEMORY SHOULD DIFFER FROM YOUR NOTES, THEN YOU SHOULD RELY ON YOUR MEMORY AND NOT ON THE NOTES. THE NOTES ARE NOT EVIDENCE. A JUROR WHO HAS NOT TAKEN NOTES SHOULD RELY ON HIS OR HER INDEPENDENT RECOLLECTION OF THE EVIDENCE AND SHOULD NOT BE UNDULY INFLUENCED BY THE NOTES OF OTHER JURORS. NOTES ARE NOT ENTITLED TO ANY GREATER WEIGHT THAN THE RECOLLECTION OR IMPRESSION OF EACH JUROR ABOUT THE TESTIMONY.

PARTIES

THIS LAWSUIT WAS FILED BY MARTHA LEIJA AND JERRY LEIJA AS NEXT FRIENDS OF ROSEMARIE LEIJA, A MINOR. UNDER OUR LAW, A MINOR CANNOT SUE IN HER OWN NAME BUT MUST SUE THROUGH HER GUARDIANS. IN THIS CASE, ROSEMARIE LEIJA'S GUARDIANS ARE HER PARENTS. STILL, THE TRUE PLAINTIFF IN INTEREST IS ROSEMARIE LEIJA AND, THEREFORE, WHEN REFERENCE IS MADE TO "PLAINTIFF," THE COURT WILL BE REFERRING TO ROSEMARIE LEIJA.

THE ONLY DEFENDANT IN THIS CASE IS CANUTILLO I.S.D.

TITLE IX

PLAINTIFF ROSEMARIE LEIJA BRINGS THIS ACTION AGAINST THE DEFENDANT CANUTILLO

I.S.D. PURSUANT TO TITLE 20, UNITED STATES CODE, SECTION 1681, OTHERWISE KNOWN AS TITLE IX. IN RELEVANT PART, TITLE IX PROVIDES THAT NO PERSON IN THE UNITED STATES SHALL, ON THE BASIS OF SEX, BE SUBJECTED TO DISCRIMINATION UNDER ANY EDUCATIONAL PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE. THE PARTIES HAVE STIPULATED THAT THE DEFENDANT CANUTILLO I.S.D. IS AN EDUCATIONAL INSTITUTION WHICH RECEIVES FEDERAL FINANCIAL ASSISTANCE.

FIRST, AS TO ROSEMARIE LEIJA, IT HAS BEEN HER BURDEN TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHE WAS INTENTIONALLY DISCRIMINATED AGAINST BASED ON HER SEX. "INTENTIONAL DISCRIMINATION" MEANS TO BE SEXUALLY HARASSED OR ABUSED. I FIND IN THIS REGARD THAT SHE HAS MET HER BURDEN AND THAT TONY PERALES SEXUALLY ABUSED OR HARASSED HER. THEREFORE, ROSEMARIE LEIJA WAS INTENTIONALLY DISCRIMINATED AGAINST BASED ON HER SEX. IN MAKING THIS FINDING, I DO NOT IMPLY THAT I HAVE DETERMINED THE NATURE OR EXTENT OF THE SEXUAL HARASSMENT OR ABUSE.

SECOND, AS TO DEFENDANT CANUTILLO I.S.D., ROSEMARIE LEIJA MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE SCHOOL DISTRICT OR ITS AGENTS KNEW, OR IN THE EXERCISE OF REASONABLE CARE SHOULD HAVE KNOWN, OF THE INTENTIONAL DISCRIMINATION (THAT IS, SEXUAL HARASSMENT OR ABUSE) OF TONY PERALES AND THEN FAILED TO TAKE THE APPROPRIATE STEPS THAT A

REASONABLE PERSON WOULD TAKE UNDER THE SAME OR SIMILAR CIRCUMSTANCES TO HALT SUCH DISCRIMINATION. IN THIS CASE, I INSTRUCT YOU THAT TONY PERALES CANNOT BE CONSIDERED AN AGENT OF CANUTILLO I.S.D. AN "AGENT' IS DEFINED AS A PERSON AUTHORIZED BY ANOTHER TO ACT ON HIS ACCOUNT AND UNDER HIS CONTROL. ALTHOUGH TONY PERALES SEXUALLY HARASSED OR ABUSED ROSEMARIE LEIJA, HE WAS NOT IN THE SCOPE OF HIS EMPLOYMENT WHEN HE DID SO BECAUSE HE WAS NOT AUTHORIZED TO DO SO. ON THE OTHER HAND, PAM MENDOZA, THE SECOND GRADE TEACHER OF ROSEMARIE LEIJA, WAS AN AGENT OF DEFENDANT CANUTILLO I.S.D. BECAUSE, AS A PART OF HER DUTIES IN THE SCOPE OF HER EMPLOYMENT, SHE WAS AN APPROPRIATE PERSON TO RECEIVE COMPLAINTS OF SEXUAL HARASSMENT OR ABUSE FROM STUDENTS LIKE ROSEMARIE LEIJA. SINCE I NOW INSTRUCT YOU THAT PAN MENDOZA WAS AN AGENT OF DEFENDANT CANUTILLO I.S.D., THEN YOU MUST DETERMINE WHETHER SHE SHOULD HAVE KNOWN, OF THE SEXUAL HARASSMENT OR ABUSE OF THE PLAINTIFF, AND THEN WHETHER SHE FAILED TO TAKE THE APPROPRIATE STEPS THAT A REASONABLE PERSON WOULD HAVE TAKEN UNDER THE SAME OF SIMILAR CIRCUMSTANCES TO HALT THE HARASSMENT OF ABUSE.

CONSIDER DAMAGES ONLY IF NECESSARY

IF YOU ANSWER THE TWO LIABILITY QUESTIONS IN PART I OF THE VERDICT FORM AFFIRMATIVELY, THEN YOU MUST DETERMINE THE DAMAGES TO WHICH THE PLAINTIFF IS ENTITLED. YOU SHOULD NOT INTERPRET THE

FACT THAT I HAVE GIVEN INSTRUCTIONS ABOUT THE PLAINTIFF'S DAMAGES AS AN INDICATION IN ANY WAY THAT I BELIEVE THAT THE PLAINTIFF SHOULD, OR SHOULD NOT, WIN THIS CASE. IT IS YOUR TASK FIRST TO DECIDE WHETHER THE DEFENDANT CANUTILLO I.S.D. IS LIABLE. I AM INSTRUCTING YOU ON DAMAGES ONLY SO THAT YOU WILL HAVE GUIDANCE IN THE EVENT YOU DECIDE THAT THE DEFENDANT CANUTILLO I.S.D. IS LIABLE AND THAT THE PLAINTIFF ROSEMARIE LEIJA IS ENTITLED TO RECOVER MONEY FROM THE DEFENDANT.

DAMAGES

IF YOU ANSWER THE TWO LIABILITY QUESTIONS IN PART I OF THE VERDICT FORM AFFIRMATIVELY, THEN YOU MUST DECIDE WHETHER ROSEMARIE LEIJA SUFFERED ANY DAMAGE AS A DIRECT RESULT OF THE LIABILITY. A DAMAGE AWARD TO PLAINTIFF MAY PROVIDE SUCH AMOUNTS AS WOULD MAKE HER WHOLE AND ALSO COMPENSATE HER FOR ANY MENTAL OR EMOTIONAL DISTRESS SHE SUFFERED. TO AWARD ANY ELEMENT OF DAMAGES YOU MUST FIND THAT PLAINTIFF HAS PROVED A BASIS FOR SUCH DAMAGES IN THE EVIDENCE. YOU MAY NOT AWARD DAMAGES BASED ON SPECULATION OR GUESSWORK.

IF YOU FIND THAT PLAINTIFF SUFFERED MENTAL OR EMOTIONAL DISTRESS, THEN YOU MAY AWARD SUCH DAMAGES WHICH FLOW NATURALLY FROM THE DEFENDANT'S ACTIONS.

WHERE MENTAL OR EMOTIONAL DISTRESS IS PROVEN, THE COURT CANNOT GIVE YOU ANY RULE BY WHICH TO MEASURE THE SPECIFIC AMOUNT OF DAMAGES RESULTING FROM SUCH AN INJURY. THIS IS A MATTER THAT IS LEFT TO THE CONSCIENCE, GOOD SENSE AND SOUND JUDGMENT OF THE JURY. YOU SHOULD NOT ACT UNREASONABLY THROUGH BIAS, PASSION OR SYMPATHY, BUT SHOULD EXERCISE COMMON SENSE AND FIX AN AMOUNT OF DAMAGES, THAT, IN ACCORDANCE WITH THE EVIDENCE AND THE LAW, WILL FAIRLY COMPENSATE PLAINTIFF ROSEMARIE LEIJA FOR ALL THE INJURIES SUFFERED.

COMPENSATORY DAMAGES

IF YOU ANSWER THE TWO LIABILITY QUESTIONS IN PART I OF THE VERDICT FORM AFFIRMATIVELY, THEN YOU MUST DETERMINE AN AMOUNT THAT IS FAIR COMPENSATION FOR ALL OF THE PLAINTIFF'S DAMAGES. THESE DAMAGES ARE CALLED COMPENSATORY DAMAGES. THE PURPOSE OF COMPENSATORY DAMAGES IS TO MAKE A PLAINTIFF WHOLE - THAT IS, TO COMPENSATE A PLAINTIFF FOR THE DAMAGE THAT HE OR SHE HAS SUFFERED. IF THE PLAINTIFF WINS, SHE IS ENTITLED TO COMPENSATORY DAMAGES FOR THE MENTAL ANGUISH, SHOCK AND DISCOMFORT THAT SHE HAS SUFFERED BECAUSE OF THE SEXUAL HARASSMENT OR ABUSE.

PROXIMATE CAUSE AND COMPENSATORY DAMAGES

YOU MAY AWARD COMPENSATORY DAMAGES ONLY FOR INJURIES THAT THE PLAINTIFF PROVES WERE PROXIMATELY CAUSED BY THE SEXUAL HARASSMENT OR ABUSE DONE TO HER. WITH REGARD TO DAMAGES, PROXIMATE CAUSE MEANS THAT WHICH, IN A NATURAL AND CONTINUOUS SEQUENCE, PRODUCES AN EVENT AND WITHOUT WHICH CAUSE SUCH EVENT WOULD NOT HAVE OCCURRED. IN ORDER TO BE A PROXIMATE CAUSE, THE CONDUCT COMPLAINED OF MUST BE SUCH THAT A PERSON USING ORDINARY CARE WOULD HAVE FORESEEN THAT THE INJURY, OR SIMILAR INJURY, MIGHT REASONABLY RESULT THEREFROM. THERE MAY BE MORE THAN ONE PROXIMATE CAUSE FOR INJURIES.

CALCULATION OF COMPENSATORY DAMAGES

IF YOU DECIDE TO AWARD COMPENSATORY DAMAGES, YOU SHOULD BE GUIDED BY DISPASSIONATE COMMON SENSE. COMPUTING DAMAGES MAY BE DIFFICULT, BUT YOU MUST NOT LET THAT DIFFICULTY LEAD YOU TO ENGAGE IN ARBITRARY GUESSWORK. ON THE OTHER HAND, THE LAW DOES NOT REQUIRE THAT THE PLAINTIFF PROVE THE AMOUNT OF HER LOSSES WITH MATHEMATICAL PRECISION, BUT ONLY WITH AS MUCH DEFINITENESS AND ACCURACY AS THE CIRCUMSTANCES PERMIT. YOU MUST USE SOUND DISCRETION IN FIXING AN AWARD OF DAMAGES, DRAWING REASONABLE INFERENCE WHERE YOU FIND THEM APPROPRIATE FROM THE FACTS AND

CIRCUMSTANCES IN EVIDENCE.

NO EVIDENCE OF THE VALUE OF INTANGIBLE THINGS, SUCH AS MENTAL PAIN AND SUFFERING, HAS BEEN OR NEED BE INTRODUCED. YOU ARE NOT TRYING TO DETERMINE VALUE, BUT AN AMOUNT THAT WILL FAIRLY COMPENSATE THE PLAINTIFF FOR THE DAMAGES SHE HAS SUFFERED. THERE IS NO EXACT STANDARD FOR FIXING THE COMPENSATION TO BE AWARDED FOR THESE ELEMENTS OF DAMAGE. ANY AWARD THAT YOU MAKE SHOULD BE FAIR IN THE LIGHT OF THE EVIDENCE.

THE DAMAGES THAT YOU AWARD MUST BE FAIR COMPENSATION FOR ALL OF THE PLAINTIFF'S DAMAGES, NO MORE AN NO LESS. YOU SHOULD NOT AWARD COMPENSATORY DAMAGES FOR SPECULATIVE INJURIES, BUT ONLY FOR THOSE INJURIES WHICH THE PLAINTIFF ROSEMARIE LEIJA HAS ACTUALLY SUFFERED OR THAT SHE IS REASONABLE LIKELY TO SUFFER IN THE FUTURE. EXPENSES FOR MEDICAL TREATMENT OR LEGAL SERVICES ARE NOT COMPENSATORY DAMAGES AND CANNOT BE CONSIDERED.

PAST VS. FUTURE COMPENSATORY DAMAGES

IN AN AWARD OF COMPENSATORY DAMAGES, THE PLAINTIFF ROSEMARIE LEIJA IS ENTITLED TO RECOVER AN AMOUNT THAT WILL FAIRLY COMPENSATE HER FOR ANY DAMAGES SHE HAS SUFFERED TO DATE. IF YOU FIND THAT THE PLAINTIFF IS REASONABLY CERTAIN TO SUFFER DAMAGES IN THE FUTURE FROM HER INJURIES, THEN YOU SHOULD AWARD HER THE AMOUNT

YOU BELIEVE WOULD FAIRLY COMPENSATE HER FOR SUCH FUTURE DAMAGES. HOWEVER, YOU MUST NOT MAKE ANY ADJUSTMENT TO PRESENT VALUE FOR ANY DAMAGES YOU MAY AWARD FOR FUTURE PAIN AND SUFFERING OR FUTURE MENTAL ANGUISH.

MENTAL ANGUISH

YOU ARE INSTRUCTED MENTAL ANGUISH MEANS (1) ANY PAIN SUFFERING AND MENTAL ANGUISH ALREADY SUFFERED BY THE PLAINTIFF AND PROXIMATELY CAUSED BY THE ACTIONS IN QUESTION; AND (2) ANY PAIN, SUFFERING AND MENTAL ANGUISH WHICH THE PLAINTIFF ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE SHE IS REASONABLY CERTAIN TO SUFFER IN THE FUTURE FROM THE SAME CAUSE.

MENTAL ANGUISH HAS BEEN DEFINED AS MENTAL PAIN, TORMENT AND SUFFERING. HOWEVER, MENTAL ANGUISH IS MORE THAN FEAR, DISAPPOINTMENT, ANGER, RESENTMENT, OR EMBARRASSMENT, AND THE PLAINTIFF MUST SHOW MORE THAN MERE FEAR, WORRY, ANXIETY, VEXATION, EMBARRASSMENT OR ANGER, ALTHOUGH IT MAY INCLUDE ALL OF THESE.

INSTRUCTIONS ON DELIBERATIONS

WHEN YOU RETIRE TO THE JURY ROOM TO DELIBERATE ON YOUR VERDICT, YOU MAY TAKE THIS CHARGE WITH YOU AS WELL AS EXHIBITS WHICH THE COURT HAS ADMITTED INTO EVIDENCE. SELECT YOU FOREPERSON AND CONDUCT YOUR DELIBERATIONS. IF YOU RECESS

DURING YOUR DELIBERATIONS, FOLLOW ALL OF THE INSTRUCTIONS THAT THE COURT HAS GIVEN YOU REGARDING YOUR CONDUCT DURING THE TRIAL. AFTER YOU HAVE REACHED YOUR UNANIMOUS VERDICT, YOUR FOREPERSON IS TO FILL IN YOUR ANSWERS TO THE QUESTIONS ON THE FORM PROVIDED. DO NOT REVEAL YOUR ANSWERS UNTIL SUCH TIME AS YOU ARE DISCHARGED, UNLESS OTHERWISE DIRECTED BY ME. YOU MUST NEVER DISCLOSE TO ANYONE, NOT EVEN TO ME, YOUR
NUMERICAL DIVISION ON ANY QUESTION.

IF YOU WANT TO COMMUNICATE WITH ME AT ANY TIME, PLEASE GIVE A WRITTEN MESSAGE OR QUESTION TO THE BAILIFF, WHO WILL BRING IT TO ME. I WILL THEN RESPOND AS PROMPTLY AS POSSIBLE EITHER IN WRITING OR BY HAVING YOU BROUGHT INTO THE COURTROOM SO THAT I CAN ADDRESS YOU ORALLY. I WILL ALWAYS FIRST DISCLOSE TO THE ATTORNEYS YOUR QUESTION AND MY RESPONSE BEFORE I ANSWER YOUR QUESTION.

APPENDIX G

Filed 2-22-95
Clerk U.S. District Court
Western District of Texas
by /s/
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARTHA LEIJA and JERRY LEIJA, as next friends of ROSEMARIE LEIJA, a minor,	§	
v.	§	EP-93-CA-478-F
THE CANUTILLO INDEPENDENT SCHOOL DISTRICT.	§	

VERDICT FORM
ANSWER ALL QUESTIONS BY A PREPONDERANCE OF THE EVIDENCE

PART I
LIABILITY

QUESTION NUMBER ONE

DID PAM MENDOZA, AS AN AGENT OF THE DEFENDANT CANUTILLO I.S.D., KNOW OR, IN THE EXERCISE OF REASONABLE CARE, SHOULD SHE HAVE KNOWN, OF THE SEXUAL HARASSMENT OR ABUSE BY TONY PERALES AGAINST ROSEMARIE LEIJA?

ANSWER: "YES " OR "NO."

ANSWER: YES

IF YOUR ANSWER IS "YES" THEN PROCEED TO QUESTION NUMBER TWO. IF YOUR ANSWER IS "NO", THEN PROCEED TO PART II.

QUESTION NUMBER TWO

DID PAM MENDOZA TAKE THE STEPS A REASONABLE PERSON WOULD HAVE TAKEN UNDER THE SAME OR SIMILAR CIRCUMSTANCES TO HALT THE SEXUAL HARASSMENT OR ABUSE BY TONY PERALES AGAINST ROSEMARIE LEIJA?

ANSWER: "YES" OR "NO."

ANSWER: NO

PART II
DAMAGES

QUESTION NUMBER THREE.

WHAT AMOUNT OF MONEY, IF ANY, PAID NOW IN CASH, WOULD ADEQUATELY COMPENSATE ROSEMARIE LEIJA FOR HARM PROXIMATELY CAUSED IN CONNECTION WITH THE INTENTIONAL DISCRIMINATION COMMITTED AGAINST HER?

ANSWER IN DOLLARS AND CENTS, FOR DAMAGES, IF ANY, OR ANSWER "NONE."

ANSWER:

PAST COMPENSATORY DAMAGES $ 900,000.00

FUTURE COMPENSATORY DAMAGES $ 500,000.00

TOTAL DAMAGES $ 1,400,000.00

PART III
FINALIZATION OF THE VERDICT FORM

PLEASE COMPLETE THE FOLLOWING INFORMATION:

2/22/95 /s/
DATE FOREPERSON

Supreme Court, U.S.
FILED
MAY 8 1997
CLERK

No. 96-1616

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

MARTHA LEIJA and JERRY LEIJA
as next friends of ROSEMARIE LEIJA, a minor,

Petitioner

vs.

CANUTILLO INDEPENDENT SCHOOL DISTRICT

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel of Record

54 pp

QUESTION PRESENTED

Did the Fifth Circuit properly reject strict liability as the standard of liability under Title IX of the Education Amendments of 1972 where no school administrator or school board member had any knowledge of the teacher's molestation of the student?

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TABLE OF AUTHORITIES

CASES

Alexander v. Yale Univ.,
459 F.Supp. 1 (D. Conn. 1977),
aff'd, 631 F.2d 178 (2nd Cir. 1980) 19

Bougher v. Univ. of Pittsburgh,
713 F.Supp. 139 (W.D. Pa.),
aff'd on other grounds, 882 F.2d 74
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Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 22

Brown v. Hot, Sexy and Safer Productions, Inc.,
68 F.3d 525 (1st Cir. 1995), *cert. denied*,
____ U.S. ____, 116 S.Ct. 1044 (1996) 13

Cannon v. Univ. of Chicago,
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Canutillo Indep. Sch. Dist. v. Leija,
101 F.3d 393 (5th Cir. 1996) 1, 8, 24

Capitano v. Secretary of Health & Human Servs.,
732 F.2d 1066 (2nd Cir. 1984) 23

Davis v. Monroe County Bd. of Ed.,
74 F.3d 1186, *vacated*, 91 F.3d 1418
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Doe v. Claiborne County,
103 F.3d 495 (6th Cir. 1996) 12

Doe v. Lago Vista Indep. Sch. Dist.,
106 F.3d 1223 (5th Cir. 1997) 8

Doe v. Petaluma City Sch. Dist.,
830 F.Supp. 1560 (N.D. Calif. 1993),
reconsidered and revised, 949 F.Supp. 1415
(N.D. Cal. 1996) 14

E.E.O.C. v. Hacienda Hotel,
881 F.2d 1504 (9th Cir. 1989) 20

Ellerth v. Burlington Industries, Inc.,
102 F.3d 848 (7th Cir. 1996),
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Floyd v. Waiters,
831 F.Supp. 867 (M.D. Ga. 1993) 19

Franklin v. Gwinnett County Pub. Schs.,
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Franklin v. Gwinnett County Pub. Schs.,
911 F.2d 617 (11th Cir. 1990),
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Guardians Ass'n v. Civil Service Comm'n of N.Y.,
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Hall v. Gus Const. Co.,
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Henson v. City of Dundee,
682 F.2d 897 (11th Cir. 1982) 14

Hirschfield v. New Mexico Corrections Dep't.,
916 F.2d 572 (10th Cir. 1990) 19, 20

Howard v. Bd. of Ed. of Sycamore Community Unit,
876 F.Supp. 959 (N.D. Ill. 1995) 19

Hunter v. Allis-Chalmers Corp.,
797 F.2d 1417 (7th Cir. 1986) 10, 20

Kelley v. E.P.A.,
15 F.3d 1100 (D.C. Cir. 1994),
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Kinman v. Omaha Pub. Sch. Dist.,
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No. 96-1616

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

MARTHA LEIJA and JERRY LEIJA
as next friends of ROSEMARIE LEIJA, a minor,

Petitioner

vs.

CANUTILLO INDEPENDENT SCHOOL DISTRICT

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Canutillo Independent School District ("CISD"), respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Fifth Circuit's decision in *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996).

STATEMENT OF THE CASE

Proceedings Below

Petitioners filed suit against Respondent and its former employee Tony Perales ("Perales"), alleging that their daughter Rosemarie Leija ("Rosemarie") was sexually molested by Perales, her physical education teacher. They asserted claims under 20 U.S.C. § 1681 ("Title IX")[1] and 42 U.S.C. § 1983.[2]

On the eve of trial, the district court granted Respondent's Motion for Summary Judgment on the § 1983 claim.[3] The case then proceeded to trial on Petitioners' Title IX claim. After two days of deliberations, the jury returned a verdict awarding Petitioners $900,000.00 in past compensatory damages and $500,000.00 in future compensatory damages. The district court ultimately entered an order that found

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[1]Title IX prohibits gender discrimination in educational programs receiving federal funds and states, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. § 1681(a).

[2]42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of [law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

[3]Appendix A and D.

Respondent liable to Petitioners under Title IX, but which ordered a new trial on damages.[4]

Respondent filed an interlocutory appeal under 28 U.S.C. § 1292(b) challenging the district court's conclusion that, under Title IX, Respondent was strictly liable for the illegal conduct of its employee. The Fifth Circuit reversed the interlocutory order and remanded the case to the district court for entry of a final judgment in favor of the Respondent.

On February 18, 1997, the district court entered its final judgment, consistent with the Fifth Circuit mandate, ordering that the Petitioners take nothing and dismissing the action on the merits. Petitioners did not file a motion for new trial or notice of appeal; the district court's judgment, therefore, became final and non-appealable on or about March 20, 1997.

Statement of Facts

The Petitioners omit several important facts and rely heavily on a series of disputed or unfounded facts. For example, they suggest that CISD did not have policies, procedures, or training regarding child abuse prior to 1991. In fact, the record proves that CISD promulgated policies and procedures including child abuse prohibitions and reporting obligations, and several teachers testified that anti-victimization programs were implemented by CISD.[5] Several teachers, including Perales, testified that they were aware of the illegality of child abuse and the consequences of employment termination.

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[4]Appendix B and C.

[5]Appendix E, F, G, H and I.

Petitioners also state that the classroom teacher was designated by the Student Handbook as the person to whom to report acts of harassment or molestation.[6] In fact, the Student Handbook that Petitioners mention states that such reports are to be handled differently from other complaints and are to be presented to the Title IX coordinator.[7]

Petitioners state that Perales was authorized to control the behavior, discipline, and impose negative sanctions and imply that this gave him authority to abuse and molest.[8] The authority of all teachers, however, is strictly limited by laws against child abuse, policies and procedures of CISD, the state code of ethics and teachers' oath of office. Teachers, including Perales, testified that Perales' conduct was illegal and contrary to CISD policies and procedures; a physical education teacher testified that he was not authorized to touch the children and could not direct them as to where they sit.

Petitioners suggest also that there was no controverting evidence that notice to the classroom teacher was sufficient under Title IX.[9] They fail to acknowledge, among other things, the Student Handbook that specifies Esther McLeod, the Title IX Coordinator, as the appropriate person for receiving such complaints.[10]

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[6]Petition, pp. 2-3.

[7]Appendix E.

[8]Petition, p. 3.

[9]Petition, p. 13.

[10]Appendix E.

Evidence presented during the trial established that:

- Rosemarie began attending Canutillo Elementary School during the 1989-90 school year;

- The only contact between Perales and Rosemarie occurred during the 1989-90 school year;

- Rosemarie did not have Perales as a physical education/health instructor after the 1989-1990 school year;

- While Plaintiffs presented evidence of a "hostile environment," there was no proof of any *quid pro quo* harassment of Rosemarie;

- Perales concealed his misconduct from school officials by acting behind closed doors and away from supervisors and other teachers;

- The Principal, Assistant Superintendent, Superintendent, and Board of Trustees, did not know about Perales' conduct toward Rosemarie;

- The only report regarding Perales' conduct toward Rosemarie was to Pam Mendoza, Rosemarie's classroom teacher;

- A series of teachers testified that they were unaware of Perales' conduct during Rosemarie's second grade year;

- Prior to 1993, Rosemarie's father and mother did not believe that Perales' conduct toward Rosemarie reached the level of molestation or abuse;

- Contrary to the Petition, Respondent's policies and procedures in effect during the 1989-90 school year prohibited sexual abuse and sexual discrimination against children;[11]

- Respondent initiated a formal Title IX complaint procedure, naming a Title IX coordinator and announcing procedures for presenting a Title IX or sexual harassment complaint;

- Perales' conduct violated his oath of office, Respondent's policies and procedures, and rules applicable to teachers at Canutillo Elementary School;

- Perales was removed from the classroom and campus once the Superintendent was notified of the unlawful conduct;

- Perales was the first known perpetrator of child abuse or sexual harassment at CISD;

- Perales had been a teacher in CISD for approximately eight years before this incident, and he had no prior history of such conduct;

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[11]Appendix E, F, G, H, and I.

- Perales and Mendoza were classroom teachers with limited authority and without administrative responsibilities.

The record demonstrates that Respondent did not know, and could not have known, about Perales' conduct until after Rosemarie entered her third grade year and no longer had contact with Perales.[12] Rosemarie was never subjected to any abuse after the first report to school administrators. Once administrators were notified, Perales was immediately removed from the classroom and, ultimately, terminated as a school employee.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Does Not Raise The Broad Question Presented By Petitioners.

The Question Presented suggested by the Petitioners is overbroad and, therefore, misleading. The issue in this case, properly framed according to the precise holding of the case, is narrow. The decision below turned solely on whether, under Title IX of the Education Amendments of 1972, a school district is strictly liable for its teacher's sexual abuse of a

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[12]The district court found that CISD did not know, and had no reason to know, of Perales' molestation of Rosemarie. *Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947, 949 (W.D. Tex. 1995). Further, it found no discriminatory custom or practice and no deliberate indifference. Appendix A, B, C, and D.

student. *Leija*, 101 F.3d at 395, 396, 400 (5th Cir. 1996). Subsequent decisions by the Fifth Circuit underscore the limited impact of the *Leija* decision:

> We recently rejected the notion that this [Title IX] language creates strict liability on the part of school districts whose teachers sexually abuse students. *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398-400 (5th Cir. 1996). But the facts in *Leija* did not require us to confront the question of what the liability standard in teacher-student sexual abuse cases actually is.

Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 652 (5th Cir. 1997); *see also*, *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997); *Marsh v. Dallas Indep. Sch. Dist.*, 1997 WL 118416 (N.D. Tex. March 10, 1997).

The Petition amalgamates *Leija* and the Fifth Circuit's subsequent decisions, *Rosa H.* and *Lago Vista*, as if they were a single case -- which they are not. This Court, however, reviews judgments, not trends. The true question in this case is whether the Fifth Circuit correctly rejected strict liability as a basis for recovery under Title IX when no school administrator or school board member had any knowledge of the teacher's molestation of the student.

II. The Decision Below Does Not Conflict With The Decisions Of Other Circuits.[13]

Petitioners attempt to demonstrate a conflict among the circuits with string cites and scant discussion. In fact, not one of the cases cited by Petitioners represents a substantial conflict on the narrow issue presented in this case. No court of appeals has recognized strict liability as a basis for recovery. Although other courts have embraced Title VII-style agency or negligence standards, the Fifth Circuit in *Leija* did not reject these alternative theories. Rather, the Fifth Circuit concluded that Petitioners' Title IX claim would fail even if such alternative standards did apply. A true conflict of decisions simply does not exist.

Even under the decisions that rely on Title VII standards of liability, Respondent could not be vicariously liable for the conduct of Tony Perales. *See, e.g.*, *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 247-49 (2d Cir. 1995) (no Title IX liability because of a lack of knowledge or notice); *cf.*, *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (Title IX liability is possible with evidence

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[13]Petitioners do not claim that the Fifth Circuit opinion conflicts with *Franklin* or any other Supreme Court precedent. Unlike the facts in this case, the *Franklin* decision found allegations of knowledge of harassment by management-level administrators:

> The complaint further alleges that though they became aware of and investigated Hill's sexual harassment of Franklin and other students, *teachers and administrators* took no action to halt it and discouraged Franklin from pressing charges against Hill. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63-64 (1992)(emphasis added).

of inaction after notice of molestation to superintendent, principal, and numerous other school employees).[14]

In *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 899-90 (1st Cir. 1988), the First Circuit reviewed a district court's summary dismissal of Title IX claims arising in the employment context. In contrast to Petitioners, the plaintiffs in *Lipsett* did not seek monetary damages under Title IX, but simply requested declaratory and injunctive relief. *Lipsett*, 864 F.2d at 884 n.3. Finding that the plaintiff presented a prima facie case of both *quid pro quo* and hostile environment harassment claims, the court of appeals ordered a trial on the merits. Additionally, the court of appeals followed the lead of the Supreme Court by rejecting the contention that "employers are always automatically liable for sexual harassment by their supervisors." *Lipsett*, 864 F.2d 881, 864; *citing*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). Rather than strictly adhering to agency principles, which were meant to be mere "guidance," the court required proof that the "employer knew or should have known of the harassment, and took no effectual action to correct the situation." *Lipsett*, 864 F.2d at 901; *citing Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417,

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[14]The *Kinman* decision recognizes the narrow, fact bound nature of Title IX decisions:

> The divergence of views on this issue [of institutional liability] stems in part from the factual disparity in the cases. Title IX cases vary both in the type of discrimination alleged . . . and in the identity of the perpetrators and victims . . . . *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 468-69 (8th Cir. 1996).

Even *Kinman* recognizes the need for notice and knowledge by school administrators. *Kinman*, 94 F.3d at 469.

1421 (7th Cir. 1986). The Fifth Circuit's decision in *Leija* is distinguishable since it is an action for damages arising in the education, not the employment, context. Further, both the district court and court of appeals found that there was no evidence of *quid pro quo* harassment or that Respondent knew or should have known of the unlawful conduct.

In *Murray v. New York University College of Dentistry*, 57 F.3d 243, 249-51 (2d Cir. 1995), the Second Circuit utilized Title VII principles and affirmed the dismissal of Title IX claims. Because the plaintiff failed to demonstrate that her employer knew or should have known of the hostile environment, the court of appeals found that the Title IX claims were properly dismissed. *Murray*, 57 F.3d at 249-51. The Fifth Circuit's decision, therefore, does not conflict -- but rather conforms -- with the Title VII analysis articulated in *Murray*.

Petitioners also cite *Davis v. Monroe County Bd. of Ed.*, 74 F.3d 1186, *vacated*, 91 F.3d 1418 (*en banc*) (11th Cir. 1996),[15] but that decision was vacated on August 1, 1996, upon the granting of the school district's petition for rehearing *en banc*. Even the vacated decision cited by the Petitioners does not conflict with the decision of the Fifth Circuit. *Davis* did

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[15]The court stated:

> Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities *knowingly* failed to act to eliminate the harassment. . . . likewise, when an educational institution *knowingly* fails to take action to remedy a hostile environment . . . . an employee can demonstrate that an employer knew of the harassment by showing that *she complained to higher management* of the harassment or by showing the pervasiveness of the harassment . . . . *Davis*, 74 F.3d at 1193-95 (emphasis added).

not permit strict liability; and, unlike the instant case, the principal allegedly had actual notice. *Davis*, 74 F.3d at 1195.

In *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467, 469 (8th Cir. 1996), the Eighth Circuit recognized that the divergence of views on Title IX liability "stems in part from the factual disparity in the cases." *Kinman* held that, while an employer should not be held liable "unless the employer itself has engaged in some culpable behavior," it reversed the district court's summary judgment since there was evidence that the employer knew or should have known of the harassment and failed to take appropriate remedial action. *Kinman*, 94 F.3d at 469.[16]

In *Doe v. Claiborne County*, 103 F.3d 495, 515 (6th Cir. 1996),[17] the Sixth Circuit reversed dismissal of Title IX claims, stating "what the defendants knew, and when they knew it, is evidence upon which a material issue in this case hinges."

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[16]The court stated:

> In such [hostile environment] cases, the employer should not be held liable *unless the employer itself has engaged in some culpable behavior*. *Kinman*, 94 F.3d at 469 (emphasis added).

[17]The court stated:

> [April 29, 1997W]hether conduct about which a plaintiff complains creates a "hostile environment" under Title IX, and *whether the educational institution took appropriate action after knowing of inappropriate conduct*, are factual questions for the jury to resolve . . . . What the defendants knew, and when they knew it, is evidence upon which a material issue in this case hinges. *Doe*, 103 F.3d at 514 (emphasis added).

Again, strict liability was not the standard, and management-level personnel allegedly were on notice.

In *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), the Tenth Circuit rejected a student's Title IX claim because he failed to show that the school officials' conduct was gender-based. The court did not recognize a strict liability standard.

The remaining cases cited by the Petitioners present issues of discrimination arising in the context of employment,[18] facilities,[19] school-sponsored programs,[20] or discipline.[21] One case, although vacated on rehearing *en banc*, failed to raise a Title IX issue in any context.[22] Several of the cases, in fact, actually rejected the validity of the Title IX claims.[23]

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[18] *Preston v. Commonwealth of Virginia*, 31 F.3d 203 (4th Cir. 1994); *O'Connor v. Peru State College*, 781 F.2d 632 (8th Cir. 1986); *Mabry v. State Bd of Community Colleges*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987).

[19] *Roberts v. Colorado State Bank of Agriculture*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

[20] *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, ____ U.S. ____, 116 S.Ct. 1044 (1996).

[21] *Yusuf v. Vasser College*, 35 F.3d 709 (2d Cir. 1994).

[22] *Ellerth v. Burlington Industries, Inc.*, 102 F.3d 848 (7th Cir. 1996), *vacated*, pending rehearing *en banc* (January 28, 1997).

[23] *Mabry v. State Bd. of Community Colleges*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987); *see also, Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996); *Preston v. Commonwealth of Virginia*, 31 F.3d 203 (4th Cir. 1994); *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, ____ U.S. ____, 116 S.Ct. 1044 (1996); *O'Connor v. Peru State College*, 781 F.2d 632 (8th Cir. 1986).

In short, while the cases cited by the Petitioners may rely on a Title VII-style analysis to formulate the Title IX standard of liability, not one case detracts from the Fifth Circuit's conclusion that Title IX claims cannot be resolved under standards of strict liability. Not one case cited by the Petitioners would allow a recovery under Title IX without proof that management-level personnel knew about the illegal conduct and failed to take prompt remedial action. Vicarious liability has not been imposed by the appellate courts based simply on the conduct of a classroom teacher. As in Title VII cases,[24] each court has held that higher management must be aware of the discrimination and fail to take appropriate remedial action.

III. The Fifth Circuit Analysis Is Correct -- Strict Liability Is Not The Appropriate Liability Standard.

A. Intentional Discrimination Is Required To Obtain Damages Under "Spending Clause" Legislation.

Many lower courts have concluded that Title IX is a Spending Clause statute.[25] Title IX is patterned after the anti-

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[24]*Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

[25]*Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997); *citing, Lieberman v. University of Chicago*, 660 F.2d 1185, 1187 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982); *see Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, ____ U.S. ____, 117 U.S. 165 (1996); *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560, 1574 n.9 (N.D. Calif. 1993), *reconsidered and revised*, 949 F.Supp. 1415 (N.D. Cal. 1996); *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 622

discrimination statute Title VI,[26] and Title VI was enacted pursuant to the Spending Clause.[27] The Spending Clause enables Congress to place conditions on the receipt of federal dollars by grant recipients.[28] The legitimacy of the conditions is the *voluntary* and *knowing* acceptance of the conditions by the grant recipient.[29] The Petitioners have disregarded this important issue, which simply is non-existent in the Title VII cases cited by Petitioners.

The analysis in *Franklin* of Title IX was based largely on the Title VI case *Guardians Association v. Civil Service Commission of New York*,[30] a case decided without a majority opinion. *Guardians* involved an employment test that had a disproportionate impact on racial minorities, which a majority of justices viewed as unintentional discrimination, thereby precluding an award of damages. "In this and similar situations," Justice White wrote, "it is not immediately obvious what the grantee's obligations were and it is surely not obvious that the grantee was aware that it was administering the

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(11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992).

[26]*See Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-95 (1979).

[27]*See Guardians Ass'n v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 598-599 (1983).

[28]*See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[29]451 U.S. at 17.

[30]463 U.S. 582 (1983).

program in violation of the statute or regulations."[31] The limitation on remedies is particularly appropriate where the plaintiff is pursuing a private cause of action "implied by the judiciary rather than expressly created by Congress."[32]

In this case, the recipient of federal funds was the Respondent's Board of Trustees, not Perales. It surely was not "obvious" that the Respondent, in 1989 and 1990, was violating Title IX and would be held strictly liable for the secret and illegal acts of one of its teachers. During the entire period of Rosemarie's enrollment at CISD, no federal regulations were in existence on the issue of sexual harassment. The regulations that exist (then and now) concern athletics, admission, housing, and the like. *See* 34 C.F.R. §§ 106.1-106.61. The regulations focus on the policies and practices of the grant recipient in administering those programs. Likewise, the legislative history of Title IX shows that both supporters and opponents focused exclusively on the policies and practices of grant recipients.[33]

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[31]463 U.S. at 598. Likewise, *Franklin* states that damages are unavailable in cases of "unintentional" discrimination because the entity lacks notice that it will be held monetarily liable. 503 U.S. at 74.

[32]*Id.* at 597.

[33]*See Rowinsky*, 80 F.3d at 1013-14 (describing floor debates). Even the dissent in *Rowinsky* recognized the importance of notice to management-level administrators as a condition to Title IX liability:

> [Title IX places] on the school board a duty not to discriminate on the basis of sex by *knowingly* failing to take prompt corrective action . . . . the statute affords protection when [an educational institution] *knowingly* fails to take reasonable steps within its power to prevent sexual harassment . . . . [a Title IX plaintiff] may recover for damages sustained thereby from a federally funded institution if the board had knowledge of the harassment

This Court's opinions in *Guardians, Cannon,* and *Pennhurst* have focused on the policies of the grant recipient itself. The secretive and criminal acts of a teacher may not be fairly characterized as a policy or practice of the grant recipient.

B. Respondents Are Not Liable Under Any Appropriate Standard of Liability.

1. Strict Liability Does Not Apply To Actions Under Title IX.

Strict liability has never been recognized as a valid basis for imputing liability to municipalities or governmental entities, and there is no Title IX precedent for doing so in "hostile environment" cases. The standard for imputing liability for damages under Title VI is based on intent, not strict liability. *E.g.*, *Guardians Ass'n*, 463 U.S. at 596-97. Since Title IX is patterned after Title VI, the two statutes must be construed in a similar fashion, and the same standard of imputed liability should apply. That is, Respondent cannot be liable without proof, at a minimum, that its Board of Trustees

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and failed to take corrective action." *If its board had knowledge of the harassment* . . . . [Plaintiffs] show that the school board had actual knowledge that the plaintiffs were being subjected to sexual harassment . . . . Indeed, it would appear that the school board in the case at bar, was given as much, if not more, *knowledge and notice* of the ongoing sexual harassment of the Plaintiffs than was given to the school board in the *Franklin* case. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, ____ U.S. ____, 117 U.S. 165 (1996) (dissenting opinion, emphasis added).

knew or should have known of Perales' abuse and failed to take remedial action. *Murray*, 57 F.3d at 248-251.

2. This Case Is Not The Appropriate Vehicle For Deciding To What Extent Title VII Principles Will Apply In Title IX Actions.

Petitioners believe that Title IX harassment claims should be treated exactly like Title VII hostile environment claims. The Fifth Circuit did not decide this question, and certiorari should not be granted for the purpose of providing an advisory opinion. Furthermore, the analogy suggested by Petitioners is imperfect.

Although Title IX and Title VII share a common prohibition against "sexual discrimination," and although some Title VII doctrines have been found to be useful in certain Title IX cases,[34] the two statutes are substantively different.[35] As this Court explained in *North Haven* in comparing Title VI and

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[34]*See, e.g., Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993)(using Title VII "disparate impact" concept in case challenging discontinuation of women's softball program), *cert. denied*, 510 U.S. 1004 (1993); *Preston v. Commonwealth of Va.*, 31 F.3d 203, 206 (4th Cir. 1994) (using "mixed motive" concept in Title IX employment action).

[35]*See, e.g., Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139, 145 (W.D. Pa.)(declining to "blandly blur the distinctions" between Title VII and Title IX and refusing "to transfer wholesale the EEOC guidelines into an area for which they were not drafted"), *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989); *see also Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617, 622 (11th Cir. 1990)(concluding that application of Title VII law to Title IX cases was too "confusing"), *rev'd on other grounds*, 503 U.S. 60 (1992).

Title IX, "[f]or although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."[36]

One of the key differences between Title IX and Title VII, completely ignored by Petitioners, is that Title VII expressly defines "employer" to include the employer's "agents."[37] Consequently, courts have applied the common law rules of agency to Title VII claims.[38] In contrast, Title IX contains no "agency" provision, and, thus, there is no textual support for applying a Title VII-style analysis.[39] "Title IX does not instruct courts to impose liability based on anything other than the acts of the recipients of federal funds."[40]

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[36] 456 U.S. at 530.

[37] 42 U.S.C. § 2000e(b)(1994); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (stating that courts should look to common-law agency principles for evaluating employer liability under Title VII).

[38] *See, e.g., Hall v. Gus Const. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988); *Hirschfield v. New Mexico Corrections Dep't.*, 916 F.2d 572, 577 (10th Cir. 1990).

[39] *See Howard v. Bd. of Ed. of Sycamore Community Unit*, 876 F.Supp. 959, 972-74 (N.D. Ill. 1995) (rejecting Title VII agency analysis in Title IX harassment case); *Floyd v. Waiters*, 831 F.Supp. 867, 876 (M.D. Ga. 1993) (rejecting Title VII agency analysis in Title IX harassment case); *see generally* Schneider, "Sexual Harassment and Higher Education," 65 TEX. L. REV. 525, 568-571 (1987) (analyzing absence of agency provision in Title IX); *see also Alexander v. Yale Univ.*, 459 F.Supp. 1, 3 (D. Conn. 1977)("the concept of mere *respondeat superior* appears ill-adapted to the question of Title IX sex discrimination based on harassment incidents"), *aff'd*, 631 F.2d 178 (2nd Cir. 1980).

[40] *Rosa H.*, 106 F.3d at 648; 20 U.S.C. § 1681(a).

Another difference between the two statutes is that, unlike Title IX, Title VII's negligence standard is tempered by statutory provisions that protect the employer from far-reaching liability, the most important of which is a statutory ceiling on the amount of monetary damages that are recoverable.[41] Title IX contains no statutory restrictions on damages, which may, as shown by the original *Leija* verdict, result in paralyzing damage awards against taxpayer-funded school districts.

While several circuits and district courts have utilized Title VII principles for some purposes under Title IX, the Fifth Circuit did *not* render an inconsistent decision in this case. It simply held that Title IX liability is not appropriate in this case since there was no evidence of knowledge or notice.

Even if the Fifth Circuit had adopted the Title VII "knew or should have known" standard, the decision would have been the same. Without knowledge or notice, the only other possible standard is "strict liability," which has been rejected by courts as the appropriate test under Title IX. The Fifth Circuit properly ruled that, even if Title VII agency principles had been applied in this case, Respondent could not be found liable for the acts of Perales. *Murray*, 57 F.3d at 248-51; *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Hirschfeld*, 916 F.2d at 577; *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989).

Only Ms. Mendoza, a classroom teacher, had some notice concerning Perales' conduct; there is no evidence that the Principal, Superintendent, or Board knew or should have

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[41] *See* 42 U.S.C. § 1981a(b)(3) (1994). Damages were not available under Title VII until 1991 when Congress enacted Section 1981a. Title IX is notably missing from Section 1981a. The omission of Title IX from Section 1981a suggests "that, in 1991, Congress did not view Title IX as the kind of legislation that could generate expansive liability." *Rosa H.*, 106 F.3d at 648 n. 4.

known of Perales' conduct toward Rosemarie. Additionally, it is undisputed that Respondent enacted policies that prohibit the sexual harassment of students and that establish a process to report incidents of harassment.

C. New OCR Guidelines Do Not Affect The Fifth Circuit Decision.

Petitioners urge the Court to accept certiorari on the ground that the Office of Civil Rights ("OCR") of the U. S. Department of Education recently promulgated guidelines on sexual harassment. The existence of these guidelines do not enhance the reviewability of the decision below.

On October 4, 1996, four years after this Court's decision in *Franklin* and long after the trial in this case, the Office of Civil Rights issued its first draft guidelines on teacher-student sexual harassment.[42] On November 27, 1996, the date that the Fifth Circuit reversed the interlocutory judgment in this case, the proposed guidelines still had not been finalized.[43] Neither the court below nor any circuit court has had the opportunity to consider the final guidelines published on March 13, 1997.

Moreover, the new substantive guidelines cannot be given retroactive effect. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when

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[42]61 Fed. Reg. 52172 (Oct. 4, 1996).

[43]The guidelines were published in final form on March 13, 1997. 62 Fed. Reg. 12034 (March 13, 1997).

the conduct took place has timeless and universal appeal."[44] The new guidelines fail to provide a clear statement of retroactive intent, and Title IX itself contains no language authorizing the Department to promulgate retroactive rules.[45] "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[46]

The Spending Clause also comes into play:

> [R]ecipients of Title IX funds are bound by their agreement with the federal government. The government can add strings to the Title IX funds as it disburses them. But it cannot modify past agreements with recipients by unilaterally issuing guidelines through the Department of Education. . . We make no comment on how these guidelines might affect cases in which a school district accepts Title IX funds after the guidelines' promulgation date.[47]

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[44]*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 1497 (1994); *see also, Rosa H.*, 106 F.3d at 658.

[45]*See* 20 U.S.C. § 1682. A general grant of rulemaking authority does not constitute authority to promulgate retroactive rules. *See Wright v. Director, Federal Emergency Mgmt. Agency*, 913 F.2d 1566, 1572 (11th Cir. 1990); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 213 (1988).

[46]*Bowen*, 488 U.S. at 208.

[47]*Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997).

Petitioners improperly wish to use the new guidelines to "increase a party's liability for past conduct."[48] OCR's new guidelines on how to comply with Title IX are not authoritative on whether past acts of alleged non-compliance may result in a money judgment. OCR expertise is irrelevant to the question of when damages are available under Title IX, "a function clearly within the purview of judicial competence."[49] In short, the recent promulgation of OCR guidelines provides no compelling basis on which to grant certiorari.

IV. The Question Presented Is Not Important

The Question Presented, properly formulated in the context of the Fifth Circuit decision, is *not* whether sexual harassment is damaging or whether schools have an obligation to respond to Title IX complaints. This case does not present issues regarding the sufficiency of Respondent's Title IX training, policies, or procedures.

Instead, the Question Presented simply asks whether a school district is strictly liable for the discriminatory acts of its personnel -- even though it had no prior knowledge of the misconduct. As mentioned before, the courts of appeal are not in conflict on this issue; not one appellate court has attempted to impose liability without fault.

The Question Presented arises from a fact bound decision wherein the district court and the court of appeals agreed that Petitioners failed to establish that Respondent -- the

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[48] *Landgraf*, 511 U.S. 244, 114 S.Ct. at 1505.

[49] *Capitano v. Secretary of Health & Human Servs.*, 732 F.2d 1066, 1075 (2nd Cir. 1984); *Kelley v. E.P.A.*, 15 F.3d 1100, 1107-09 (D.C. Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct 900 (1995).

grant recipient -- knew, or should have known, of the discriminatory acts of a physical education teacher.[50] The court of appeals simply disagreed with the district court that damages under Title IX are predicated on strict liability principles; and, then ruled that other standards of liability -- whether based upon Title VII, agency, or other concepts -- also precluded recovery.

The Question Presented is, therefore, not one of sufficient import for review by this Court.

CONCLUSION

In an attempt to elevate this case into one worthy of review, the Petitioners grossly exaggerate the impact of the decision below and represent that a conflict exists in the circuit courts when none in fact exists. The Petitioners also assert that the decision below conflicts with newly promulgated guidelines of the U.S. Department of Education's Office of Civil Rights. The OCR guidelines were not raised by Petitioners as a possible issue on appeal until *after* the Fifth Circuit rendered its decision.

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[50]The Fifth Circuit specifically limits its decision to the unique facts of the case:

> [B]ased on the facts in this case (especially because the only notice was to another teacher), it is not necessary now to move beyond our rejection of strict liability and adopt a liability standard for Title IX cases of the type at hand.

Leija, 101 F.3d at 400. The broader issues, such as the Question Presented proposed by Petitioners, were left for subsequent decision of the court of appeals.

Contrary to Petitioners' allegations, the Fifth Circuit did not reject "any application of Title VII precepts" *or* abolish "any possibility for liability under Title IX."[51] Instead, the Fifth Circuit simply ruled that school districts are not subject to Title IX liability under strict liability standards. The district court found, and the court of appeals agreed, that the Petitioners failed to show that the school district had prior notice of the harassment and, thus, did not fail to take appropriate remedial action.

Petitioners' emotional criticism of the Fifth Circuit opinion attempts to obscure the fact that the court of appeals was engaged in the unemotional task of interpreting a federal statute. In reaching its conclusions about the parameters of Title IX, the Fifth Circuit analyzed the text, legislative history, and Spending Clause origin of Title IX.

The Fifth Circuit opinion does not purport to be a referendum on sexual harassment and does not invite the nation's school authorities to ignore the problems of sexual harassment in the schools. School districts may be investigated by the OCR, may lose their federal funding, may be directed to make changes in their procedures or policies, and may be sued for damages when intentional discrimination by school authorities is established. Furthermore, school administrators may be sued in their individual capacities under 42 U.S.C. § 1983 if they disregard allegations of sexual abuse by school employees. These sources of liability, combined with a natural pedagogical concern, create a powerful incentive for educators to protect students. Finally, students have common law remedies. As Petitioners did in this case, students may file criminal charges and initiate a civil action directly against the perpetrator.

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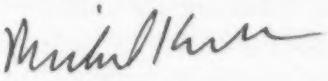
[51]Petition, p. 7.

Absent evidence of intentional discrimination based on gender by the grant recipient, the judicial inquiry under Title IX should end. The Fifth Circuit correctly ruled that, on the record in this case, Title IX liability cannot be imposed where the school district did not know -- and could not reasonably have known -- of the misconduct.

The petition for writ of certiorari, therefore, should be denied.

DATED: May 8, 1997.

Respectfully submitted,



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APPENDICES

APPENDIX A

Excerpts From MEMORANDUM OPINION and ORDER Filed June 9, 1995[1]

Here the record is simply devoid of evidence that the Board of CISD was deliberately indifferent to the sexual harassment by Coach Perales. There are no facts indicating that the Board had any knowledge of Coach Perales' conduct. The Board was never informed of the allegations made by Mr. and Mrs. Leija regarding Coach Perales until February 1991. At such time, Coach Perales was immediately removed from the classroom. Furthermore, prior to the Board receiving notice of the allegations in February 1991, Coach Perales had worked at CISD for about eight years with no allegations of misconduct. It would be factually impossible for the Board to be deliberately indifferent to Rosemarie's rights when it did not have any knowledge of unconstitutional conduct by Coach Perales. Therefore, the Court finds that CISD is entitled to summary judgment as to the claim it had a custom of tolerating teachers that sexually abused students and thus of acceding to such abuse and of inadequately investigating and disciplining teachers who sexually abused students.

* * * *

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[1]These are excerpts from the opinion filed by the district court, after the trial, to reflect its ruling on the Respondent's Motion for Summary Judgment. Record on Appeal at Vol. VII, pp. 2656-2664.

Here the record indicates that the Board had developed and implemented policies and procedures for handling complaints of sexual abuse. The Board had a policy requiring district personnel to report suspected child abuse to school officials and law enforcement agencies. To implement this policy CISD performed in-service training with teachers regarding their duty to report suspected child abuse. Thus, despite the Leijas' assertions to the contrary, the Court finds that the Board had a policy of training its employees to detect and investigate alleged abuse of students.

* * * *

In this case, there is no evidence in the record that any member of the Board or other high-ranking administrative official should have known of the existence of sexual harassment by Coach Perales. Since there is no evidence that CISD had notice of a deficiency in its procedures, CISD is entitled to summary judgment on the Leija's failure to train claim.

* * * *

In sum, the Leijas have failed to adduce summary judgment evidence of deliberate indifference by CISD toward Rosemarie's constitutional rights. Accordingly, CISD is entitled to summary judgment on the Leija's claim under Section 1983.

* * * *

The Court believes a summary judgment is inappropriate under Title IX. An opinion filed subsequent hereto will set forth this Court's view of Title IX as it relates to this case.

APPENDIX B

Excerpts From MEMORANDUM OPINION and ORDER Filed June 9, 1995[2]

In light of the court's view of Title IX, which has evolved since the trial ended three months ago, the court believes that the agency questions were unnecessary. Instead, in cases such as this one, the court believes that the actions of a teacher should be strictly imputed to an educational institution.

* * * *

[T]he plaintiff must establish some form of imputed liability or else lose her suit. The court has already granted summary judgment on Miss Leija's section 1983 claim because the School District's board had no knowledge of the abuse she suffered and therefore could not have been deliberately indifferent to her rights. The question thus becomes whether the intentional discrimination of Coach Perales against Miss Leija, unknown by the school board or administrators of the Canutillo Independent School District, can still be imputed to the District under Title IX.

* * * *

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[2]These are excerpts from the opinion filed by the district court, after the trial, to reflect its ruling on Title IX liability standards and the measure of damages. Record on Appeal at Vol. VII, pp. 2665-2690.

These acts of the employees must accordingly be imputed to the district in a meaningful way, so that the intent of Congress to provide a remedy for intentional discrimination is not thwarted. To be certain that it is not, this court thus believes that acts of employees should be imputed to the school district under strict liability principles.

APPENDIX C

Excerpts From ORDER OVERRULING POST-TRIAL MOTIONS AND GRANTING REQUEST TO CERTIFY INTERLOCUTORY APPEAL, Filed September 8, 1995[3]

Under the circumstances, the court remains convinced that its strict liability approach is appropriate for that category of cases under Title IX where a teacher is found to have sexually abused a grade school student.

* * * *

Finally, in regard to *Murray*, the Second Circuit was dealing with a fact situation far different from the fact situation here. For that reason, this court does not believe that *Murray* is instructive in this case. *Murray* involved a female dental student who was allegedly harassed by a dental patient while at the Dental School. By contrast, Miss Leija was sexually abused by her physical education teacher during her second grade year. The facts create two very different categories of cases, at least as analyzed by this court in its Memorandum Opinion.

* * * *

Canutillo Independent School District asks this court to reconsider its liability holding on the basis that a school district

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[3]These are excerpts from the district court's opinion reflecting its findings concerning an interlocutory appeal. Record on Appeal at Vol. VII, pp. 2763-2771.

cannot be liable under Title IX unless it has notice of the intentional discrimination of a teacher against a student. In this case, the School District did not have actual notice of the acts of the teacher against Miss Leija and there is no evidence that it knew or should have known of those acts.

APPENDIX D

Transcript of Proceedings On February 13, 1995[4]

Mr. Kuhn: Could you supplement your findings to find also the deliberate indifference issue because, remember, we outlined that for you and I think that that will be an independent ground for your ruling on the motion for summary judgment is that there is no evidence or deliberate indifference on the part of the school district. At least the 5th Circuit likes guidance as to why you ruled the way you did.

The Court: Depending on what happens in this case, I may not, but I will probably write an opinion but, yes, I will find that the school board did not indicate there would be indifference based upon what it knew because I find, again, of course, respondeat superior does not apply, there is no indication that the school board had direct knowledge, actual notice, or even constructive notice of what was going on here. So, I find that under those circumstances they could not have had --

Mr. Kuhn: Deliberate indifference.

The Court: Deliberate indifference.

Mr. Kuhn: Yes, sir.

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[4]Record on Appeal at Vol. 17, p. 4, l. 13 through p. 5, l. 9

The Court: As to what was happening. I am glad to do that.

APPENDIX E

Excerpts From STUDENT/PARENT HANDBOOK (1989-1990)[5]

This handbook is for the information and guidance of the students at Canutillo Elementary School. In it are rules, regulations and information to be followed by students in their daily school lives.

* * * *

The Canutillo Independent School District adheres to all Title VI regulations prohibiting discrimination because of race, color or national origin. Title IX regulations prohibiting sex discrimination and complies with Section 504 and does not discriminate against disadvantaged or handicapped persons. Inquiries concerning the application of Title VI, IX and Section 504 may be referred to:

Esther E. McLeod, Title IX Coordinator
Dr. Margaret Johnson, 504 Coordinator
7273 Bosque Rd.
Canutillo, Texas 79835
(915) 877-3726

* * * *

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[5]Defendants' Exhibit No. 4.

Students and/or parents who have a complaint regarding possible discrimination on the basis of sex should contact Esther McLeod, Asst. Supt.

APPENDIX F

Excerpts From CISD POLICY MANUAL

EMPLOYEE STANDARDS OF CONDUCT [POLICY NO. DH (E)][6]

The Texas educator should strive to create an atmosphere that will nurture to fulfillment the potential of each student.

* * * *

The educator is responsible for standard practices and ethical conduct toward students, professional colleagues, parents, and the community.

* * * *

The educator shall possess mental health, physical stamina, and social prudence necessary to perform the duties of his professional assignment.

* * * *

The educator shall organize instruction that seeks to accomplish objectives related to learning.

* * * *

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[6]Defendants' Exhibit Nos. 13.

The educator shall comply with written local school board policies, Texas Education Agency regulations, and applicable state laws.

APPENDIX G

Excerpts From CISD POLICY MANUAL

STUDENT WELFARE: CHILD ABUSE
[Policy No. FFG (H) - P][7]

Any person who has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect shall make such reports as are required by law. *Family Code 34.01.*

* * * *

Nonaccusatory reports shall be made reflecting the reporter's belief that one or more of the following acts has occurred:

1. A child has been or will be abused or neglected.

2. A child has died of abuse or neglect.

3. A child has violated the compulsory school attendance laws on three or more occasions.

4. A child has, on three or more occasions, been voluntarily absent from his home without the consent of his parent or guardian for a substantial length of time or without the intent to return.

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[7]Defendants' Exhibit Nos. 19, 20.

* * * *

These reports shall be directed to any of the following:

1. Any local or state law enforcement agency.

2. The Texas Department of Human Services.

3. The agency designated by the court to be responsible for the protection of children.

The report shall contain the name and address of the child, the name and address of the person responsible for the care of child, if available, and any other pertinent information.

* * * *

If a professional has cause to believe that a child has been or may be abused or neglected, that person shall make an oral report as prescribed above not later than 48 hours after the hour the person first suspects that the child has been or may be abused or neglected. In all instances, a written report shall be made within five days to the same agency or department.

APPENDIX H

Excerpts From CISD POLICY MANUAL

STUDENT WELFARE: CHILD ABUSE
[Policy No. FFG (K) - P][8]

Abuse includes the following acts or omissions by a person responsible for a child's care, custody, or control . . . .

* * * *

Failure to make reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child.

* * * *

Sexual contact, sexual intercourse, or sexual conduct, as those terms are defined by Section 43.01, Penal Code, sexual penetration with a foreign object, incest, sexual assault, or sodomy inflicted on, shown to, or intentionally practiced in the presence of a child if the child is present only to arouse or gratify the sexual desires of any person.

* * * *

Failure to make a reasonable effort to prevent sexual contact, sexual intercourse, or sexual conduct, as those terms are defined by Section 43.01, Penal Code, sexual penetration

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[8]Defendants' Exhibit No. 22.

with a foreign object, incest, sexual assault, or sodomy being inflicted on or shown to a child by another person, or intentionally practiced in the presence of a child by another person if the child is present only to arouse or gratify the sexual desires of any person.

* * * *

Compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code.

APPENDIX I

Excerpts From CISD POLICY MANUAL

STUDENT RIGHTS AND RESPONSIBILITIES
[Policy No. FN (L) - A][9]

Each student is expected to respect the rights and privileges of other students, teachers, and District staff; all teachers, administrators, and other District personnel are expected to have respect for the rights and privileges of students.

* * * *

The administration shall periodically review student handbooks and recommend revisions to the Board for its approval. Student handbooks are approved by the Board and constitute an extension of Board policy. Violation of conduct provisions contained in the handbooks shall result in disciplinary action. (See FO, FOA, FOD).

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[9]Defendants' Exhibit No. 23.